

Stereo.HCJDA-38
JUDGMENT SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

C.R. No.40284 of 2020

Muhammad Alam
v.
Darbari Khan

J U D G M E N T

Date of Hearing	25.1.2023
Petitioner by	Mr. Imtiaz Hussain Khan Baloch, Advocate
Respondent by	Mr. Haider Ali Khan, Advocate

Rasaal Hasan Syed, J. Petitioner in this civil revision has challenged judgments and decree dated 12.10.2018 and 11.6.2020 of the courts below in terms whereof the suit for specific performance of the petitioner was dismissed and return of earnest money of Rs. 50,000/- was allowed which judgment was affirmed in appeal.

2. Petitioner/plaintiff instituted a suit for specific performance to enforce sale agreement dated 01.2.2008 in respect of land measuring 10 marlas at Chak No.63/MB Tehsil and District Khushab, claiming that in terms of the agreement the land was contracted to be sold in favour of the petitioner for Rs.2,50,000/-; a sum of Rs.50,000/- was claimed to have been paid as earnest money; another amount of Rs.50,000/- was paid by the petitioner on 10.2.2008; the

respondent did not transfer the land in favour of the petitioner and that the petitioner was entitled to the enforcement of sale agreement through the indulgence of court. In response respondent did not deny the execution of agreement but claimed that in terms of agreement the balance amount of Rs.2,00,000/- was to be paid till 01.5.2008 which commitment having not been fulfilled the earnest money stood forfeited and the agreement stood terminated of which a notice was also sent to the petitioner and that the suit was barred by time having been filed after more than five years. Parties' evidence was recorded whereafter the learned Civil Judge dismissed the suit vide judgment dated 12.10.2018 with the findings that the suit was barred by time, the plea of additional payment of Rs.50,000/- could not be proved; the petitioner could not prove his readiness and willingness to perform his part of obligation and that despite rescission of agreement the suit was filed after more than five years from the date fixed in the agreement dated 01.2.2008. The suit to the extent of relief of specific performance was declined while the respondent was directed to refund Rs.50,000/- being received as earnest money. Parties filed separate appeals i.e. civil appeal No.373 of 2019 titled Muhammad Alam v. Darbari Khan and civil appeal No.374 of 2019 titled Darbari Khan v. Muhammad Alam before the District Judge, Khushab. The petitioner's appeal was against the dismissal of suit for specific performance while the respondent's appeal was to the extent of direction to refund earnest money. Both

the appeals were dismissed by learned Addl. District Judge, Khushab vide judgment dated 11.6.2020. In the instant revision petition the petitioner/plaintiff has challenged the judgments and decree of the courts below whereby the suit to the extent of relief of specific performance of agreement was concurrently dismissed.

3. Learned counsel for the petitioner submitted that the courts below did not consider the documents in proper perspective; the evidence produced by the petitioner was either ignored or misread; payment of additional amount of Rs.50,000/- was proved on record which fact was incorrectly decided against the petitioner; the petitioner had proved his readiness and willingness to seek a decree for specific performance and that the discretion was not exercised in accordance with law. In response learned counsel for the respondent supported the findings of the courts below.

4. Points raised in the course of hearing have been given due consideration in the light of the evidence on record and the findings recorded by the courts below. The agreement to sell was admittedly executed on 01.2.2008 wherein the consideration was fixed as Rs.2,50,000/- out of which a sum of Rs.50,000/- was paid as earnest money and this fact was acknowledged in the agreement itself. In terms of the agreement the balance sale consideration was payable till 01.5.2008. It was stipulated that in case of failure to make payment the agreement would stand rescinded and earnest money will be liable to forfeiture. Petitioner's claim was that

he was willing to perform his part but on account of respondent's failure to perform the obligations as per agreement, the same could not be effected while the respondent's stance was that the petitioner never made the payment of balance consideration and the agreement was rescinded after the expiry of the cut-off date of which a notice was sent to the petitioner but despite that the suit was instituted after expiry of limitation. Both the courts below have concluded that the suit was barred by time. Original agreement of sale was not produced nor any permission to adduce secondary evidence was ever solicited from the courts instead copy of the agreement Mark-A was produced which was placed on record. The courts below after observing that the original document was not produced considered the copy thereof for the reason that the existence of agreement was not in issue. As per conditions of the agreement payment of balance amount of consideration i.e. Rs.2,00,000/- was to made till 01.5.2008, to conclude the sale. Limitation to file a suit for specific performance of sale agreement is regulated by Article 113 of Limitation Act, 1908 which provides *that if a date is fixed for the performance, the suit could be instituted within three years from the date so fixed and if no such date is fixed the suit could be filed when the vendee has noticed that the performance has been refused*. The suit of the petitioner falls in the first part of Article 113 *ibid.* as in the agreement Mark-A itself the parties had fixed date for the payment of balance consideration and completion of sale till

01.5.2008. This fact was also admitted by the petitioner in his statement as P.W.1 wherein in cross-examination he stated that it is correct that the agreement was executed on 01.2.2008 and that the suit was instituted on 17.12.2013. It was also admitted that in the agreement it was stipulated that balance amount of Rs.2,00,000/- was payable till 01.5.2008 and in case of non-payment the agreement would stand rescinded and earnest money would be liable to be forfeited. In view of the admission made in the statement of P.W.1, the plaintiff that agreement provided for a date of *terminus a quo*, under Article 113 *ibid.* suit could be instituted only within three years from the date which the parties had agreed for the completion of the deal. In this case the agreement is dated 01.2.2008 while the suit was filed on 17.12.2013 i.e. after more than five years and seven months from the date fixed in the agreement for payment of balance consideration which was obviously barred by time and it was rightly so concluded by the courts below to be so which findings do not suffer from any error of law or from any misreading of record.

5. As far as the relief of specific performance is concerned which is discretionary in its nature, the petitioner was expected to prove that he was ready and willing to perform his part of agreement from the date of its execution till the date fixed for payment of balance sale consideration; and also to prove that he did take steps necessary for the performance of his part. In the instant case the findings are that the petitioner could not perform his part of agreement. In

terms of the sale agreement dated 01.2.2008 the petitioner admittedly had to pay the balance consideration of Rs.2,00,000/- till 01.5.2008, which was not proved to have been offered/tendered or paid. It was asserted by petitioner that after the sale agreement another sum of Rs.50,000/- was paid to the respondent on 10.2.2008 but no receipt or any acknowledgement could be produced on record. The statement of the witness in this context being unworthy of any credence was rightly disbelieved by the courts below. The pleadings and the evidence show that the petitioner never approached the respondent to tender balance amount of consideration nor served any notice for performance of agreement upon the respondent till 01.5.2008 or thereafter till the institution of the suit on 17.12.2013. The cut-off date for the payment of balance consideration was 01.5.2008 but the evidence does not indicate that the petitioner ever called upon the respondent to receive the balance consideration amount. Strangely enough the suit was filed on 17.12.2013 after five years and nine months from the date of agreement i.e., 01.2.2008. It was dismissed on 12.10.2018 while first appeal thereagainst was dismissed on 11.6.2020; but neither at the time of institution of suit nor throughout its pendency the petitioner ever attempted to deposit the balance sale price. Even till the decision of the appeal on 11.6.2020 the petitioner never attempted to tender/deposit the balance sale price to show his bona fide. Being so, it was not a case in

which the petitioner was entitled to any relief in equitable jurisdiction.

6. It is manifest from the facts noted supra that the petitioner could not prove having ever paid or tendered for payment the balance amount of consideration nor produced any documentary evidence such as cheque, pay order, for payment of balance consideration. So much so after the filing of suit till the filing of appeal no attempt was made to deposit the balance sale price. It was, therefore, a case in which the discretionary jurisdiction could not be exercised in his favour and was rightly declined by the courts below. Reference can be made to the case of “Nazar Hussain and another v. Syed Iqbal Ahmad Qadri (Deceased) through his L.Rs. and another” (2022 SCMR 1216) where it was observed to the effect that a buyer’s primary obligation in a contract of sale is to make payment of the balance sale consideration as stipulated in the contract and that if the seller refuses to receive payment the buyer must establish that he had the required money which was kept aside for the seller, for instance, by making a pay order or cashier cheque in his name as this would show that the buyer no longer had access to the sale consideration and that alternatively the buyer could have deposited it in court. In that case the petitioners had done neither. It was further observed to the effect that if a buyer does not fulfill its primary obligations to secure/tender the sale consideration and files suit and does so without depositing the sale consideration in court, the seller is placed

in an advantageous position. In that case the agreement was dated 17.3.2004 whereas the suit was filed on 17.3.2007 and that in 2022 after eighteen years, it would be eminently unfair if the petitioners, the purported buyers were permitted to pay the same amount to the seller.

7. The courts below, in the instant case, after considering all these material facts rightly concluded that the petitioner was not entitled to seek specific performance of the agreement which was executed on 01.2.2008. The findings recorded by them do not suffer from any error of law, misreading and non-reading of evidence or any jurisdictional defect as to call for interference.

8. Resultantly, this revision petition is without substance which is, accordingly, is **dismissed**.

(RASAAL HASAN SYED)
JUDGE

Announced in open Court on 03.2.2023.

Judge

Approved for reporting

Judge

Imran*