

Judgment Sheet

**IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT**

Case No:RFA No.45873/2023.

Humayon Sajjad Vs. Aslam Khan

JUDGMENT

Date of hearing	15.05.2024
Appellant by	Mr. Muhammad Akram Khan, Advocate
Respondent by:	Mr. Haider Zaman Khan, Advocate

ABID AZIZ SHEIKH, J. This regular first appeal is directed against the order and decree dated 03.07.2023 (**impugned order**), whereby the suit for possession through specific performance instituted by the appellant against the respondent has been dismissed due to non-deposit of remaining sale consideration.

2. Relevant facts are that respondent is owner of land measuring 77-Kanal 04-Marla according to Register Haqdaran Zamin for the year 2019-2020 situated within the revenue limits of Mauza Goil, Tehsil Ferozewala, District Sheikhupura (**suit property**). It is averred in the suit that appellant and respondent entered into agreement to sell dated 12.10.2022 for total sale consideration of Rs.10,13,25,000/- @ Rs.1,05,00,000/- per acre and out of total aforesaid sale

consideration, the appellant paid Rs.2,00,00,000/- as earnest money and the remaining amount was to be paid by 26.05.2023. Due to failure on part of the respondent to perform his part of agreement, the suit was filed. During course of proceedings, the order dated 17.03.2023 was passed to deposit the remaining sale consideration and after various opportunities, the suit was dismissed for non-deposit of the remaining sale amount on 03.07.2023, hence this appeal.

3. Learned counsel for the appellant submits that the respondent denied the execution of agreement to sell and claimed it to be a forged and fictitious document, therefore, the appellant was not required to deposit the remaining sale consideration in view of law settled by the Supreme Court in Muhammad Asif Awan vs. Dawood Khan and others (2021 SCMR 1270). Further submits that the appellant had already filed application under Order XXIII Rule 1 of the Code of Civil Procedure, 1908 (**CPC**) to withdraw the suit due to formal defect but instead of allowing said application, the suit was dismissed.

4. The learned counsel for the respondent on the other hand supported the impugned order. Further submits that after dismissal of the suit on 03.07.2023, another suit through Irfan Ali (witness of agreement to sell) has been filed in respect of the same suit property and interim relief has been obtained. He

submits that in said suit, the appellant is respondent No.1 but astonishingly neither any role is attributed to the appellant nor any relief has been claimed against him. He submits that appellant is abusing the process of this Court by filing different frivolous suits and harassing the respondent.

5. Arguments heard. The record shows that appellant filed suit for specific performance on the basis of agreement to sell dated 12.10.2022 in respect of suit property and claimed that out of total sale consideration Rs.10,13,25,000/-, he paid Rs.2,00,00,000/- and therefore, balance amount is Rs.8,13,25,000/-. The Trial Court passed restraining order against alienation of the suit property on 18.01.2023 and before filing of the written statement on 17.03.2023 directed the appellant to deposit remaining sale consideration before the next date of hearing. Thereafter the appellant was granted repeated last opportunities on 17.04.2023, 10.05.2023 and 25.05.2023 but the remaining sale consideration was not deposited. Finally on 10.06.2023, the counsel for the appellant gave undertaking to deposit remaining sale consideration before the next date of hearing without fail and on said undertaking, a specific direction was issued to deposit the remaining consideration otherwise suit will be dismissed. On 03.07.2023, the appellant did not deposit the remaining sale consideration but filed application for withdrawal of the suit,

however the Trial Court declined withdrawal of suit application and also dismissed the suit for non-deposit of the sale consideration.

6. The legal question requires determination in this case is that whether in such circumstances, the Court could dismiss the suit for non-deposit of the remaining sale consideration. This moot question remained subject matter of discussion before Supreme Court in following case law:-

(i) *The Supreme Court of Pakistan in judgment reported as Hamood Mehmood vs. Mst. Shababa Ishaque and others (2017 SCMR 2022) has held as follows:-*

"It is mandatory for the person whether plaintiff or defendant who seeks enforcement of the agreement under the Specific Relief Act, 1877, that on first appearance before the Court or on the date of institution of the suit, it shall apply to the Court getting permission to deposit the balance amount and any contumacious/omission in this regard would entail in dismissal of the suit or decretal of the suit, if it is filed by the other side."

(ii). *The aforesaid judgment was followed by the apex Court in judgment reported as Messrs Kuwait National Real Estate Company (Pvt.) Ltd. and others vs. Messrs Educational Excellence Ltd. and another (2020 SCMR 171) and held as under:-*

"It is now well settled that a party seeking specific performance of an agreement to sell is essentially required to deposit the

sale consideration amount in Court. In fact, by making such deposit the plaintiff demonstrates its capability, readiness and willingness to perform its part of the contract, which is an essential prerequisite to seek specific performance of a contract. Failure of a plaintiff to meet the said essential requirement dissentiles him to the relief of specific performance, which undoubtedly is a discretionary relief.”

(iii). The Supreme Court of Pakistan in a case reported as Muhammad Shafiq Ullah and others vs. Allah Bakhsh (deceased) through L.Rs. and others (2021 SCMR 763) has held as under:-

“6. Admittedly, neither Matiullah nor his legal heirs (the petitioners herein) tendered the balance sale consideration to the sellers (respondent Nos.4 to 10) nor deposited the same in court, if they had refused to receive it. Not paying the balance of the sale consideration constituted violation of an ‘essential term of the contract that on his (buyer’s part remains to be performed’ (clause (b) of section 24 of the Specific Relief Act). Therefore, for this reason too the specific performance of the purported contract could not be enforced. Matiullah and the petitioners also did not demonstrate that they were ready, able and willing to perform their obligation to make payment of the balance sale consideration.”

(iv). The Supreme Court in case reported as Inayatullah Khan and others vs. Shabbir Ahmad Khan (2021 SCMR 686) has also examined the aforesaid question and in paragraph No.15 has observed as under:-

"A person seeking the specific performance of a contract must first show that he is ready, able and willing to perform his obligations under the contract, but this the respondent had failed to do. The law does not require that the balance sale consideration must be tendered or deposited in court, but such tender/deposit helps establish that the buyer was not at fault. The respondent's learned counsel's contention that only after the court directs the deposit of the sale consideration, is it to be deposited, is misplaced. We may also take judicial notice of the fact that invariably the value of money depreciates over time and that of land appreciates. Courts adjudicating such cases should not be unmindful of this reality and should endeavour to secure the interest of both parties. In a suit for specific performance of land, if the seller/vendor has refused to receive the sale consideration, or any part thereof, it should be deposited in court and invested in some government protected security (such as Defence or National Savings Certificates); in case the suit is decreed the seller would receive the value of money which prevailed at the time of the contract and in case the buyer loses he can similarly retrieve the deposited amount".

(v). The apex Court in case reported as Mst. Samina Riffat and others vs. Rohail Asghar and others (2021 SCMR 7) has also endorsed the aforenoted view in paragraph No.13 as under:-

"In cases arising out of sale of immovable property a vendee seeking specific performance has to demonstrate his readiness and willingness to perform his part of reciprocal obligation as to payment of balance sale consideration. The question what is readiness and willingness to perform a contract was attended to by a

learned Division Bench of the West Pakistan High Court (Karachi) in the case of “Abdul Hamid vs. Abbas Bhai-Abdul Hussain” It was held that “In the first place, willingness to perform ones contract in respect of purchase of property implies the capacity to pay the requisite sale consideration within the reasonable time. In the second place, even if he has the capacity to pay the sale consideration, the question still remains whether he has the intention to purchase the property. On consideration of all the facts it appears that the appellant was not in a position to pay the balance sale consideration. At any rate, the appellant was not willing even if he had the capacity to pay the money, to have the sale deed completed.”

7. The same view was also expressed in Muhammad Yousaf vs. Allah Ditta and others (2021 SCMR 1241) and Mst. Rehmat and others vs. Mst. Zubaida Begum and others (2021 SCMR 1534). From above case law it is manifest that the purpose of directing the vendee to deposit remaining sale consideration is on one hand to enable him to demonstrate his readiness, ableness and willingness to perform his contractual obligation and on the other hand also to safeguard the rights of the vendor. Therefore in ordinary circumstances, order by Court to deposit remaining sale consideration, cannot be termed as harsh, oppressive or unlawful.

8. The argument of the appellant counsel that merely because respondent denied the execution of the agreement to sell, therefore, the appellant could not be required by Court to

deposit the balance sale consideration in view of *Muhammad Asif Awan case* supra, is also misconceived. In the case of *Muhammad Asif Awan* supra, the execution of agreement to sell was denied being forged and fictitious but notwithstanding the above fact, the Trial Court directed the vendee/plaintiff to deposit the remaining sale consideration which was finally deposited but during the time extended by the Trial Court as well as Appellate Court. In said case, the High Court set aside the order for extension of time and consequently dismissed the suit, however the Supreme Court allowed the appeal mainly on the ground that when direction to deposit remaining consideration has been issued to establish bonafide of the vendee/plaintiff and not at the instance of the vendor/defendant, the Trial Court had power to extend the time, whereas in case the remaining amount deposit is at the instance of the vendor/defendant, the Court will become functus officio. In the present case, no doubt the direction to deposit the remaining sale consideration was not at the instance of the vendor but as per direction of the Court to prove the readiness and bonafide of the appellant but not only the appellant failed to deposit the remaining sale consideration despite several opportunities including last warning on 10.06.2023 but the appellant otherwise never challenged the

said order for deposit of the balance sale consideration or sought extension of time to deposit the sale consideration.

9. The Supreme Court in para 12 of the Judgment of Muhammad Asif Awan case supra, further held that suit can be dismissed for non-deposit of balance amount provided that the plaintiff has put to notice that non-deposit would deem to be his incapability of performance of his part of contract as envisaged under section 24(b) of the Specific Relief Act, 1877 (Act). Relevant para 12 is reproduced hereunder:-

“In the given circumstances, unless the appellant would have been put to notice that the non-deposit of the balance sale price would be deemed to be his incapability of performing his part of the contract as envisaged under section 24(b) rendering the contract non-enforceable, the suit could not have been dismissed. Even otherwise, the language employed in Order XVII, Rule 3 by using word, “the Court may, notwithstanding such default, proceed to decide the suit forthwith” is permissive and discretionary and does not in all circumstances entail penal consequences and the discretion exercised by the trial court by extending time for deposit of balance sale price pendente lite just for few days in the face of denial of deal by the vendor was not perverse entitling High Court to interfere in its writ jurisdiction.”

In the present case, the appellant was specifically directed as last opportunity to deposit the remaining consideration on 17.03.2023, 17.04.2023, 10.05.2023, 25.05.2023 and thereafter finally on 10.06.2023, he was put to notice that for non-deposit of the balance sale price, his suit will be dismissed. Therefore,

the petitioner's case does not fall under the exception of para 12 of *Muhammad Asif Awan case* supra.

10. The next argument of the appellant that his application under Order XXIII Rule 1 CPC for withdrawal of the suit could not be dismissed has also no basis. Bare reading of said application shows that neither any formal defect nor sufficient ground for allowing the appellant to institute fresh suit for the subject matter of his suit or part of the claim has been specified. Therefore, the Trial Court has lawfully dismissed the said application being merely an attempt to circumvent the repeated directions of the Court to deposit the balance consideration.

11. In view of above case law and the facts in this case as discussed above, it is manifest that the conduct of the appellant was not only contemptuous but also dilatory for the reason that he despite availing various opportunities including last and final opportunity dated 10.06.2023 failed to deposit the balance sale consideration, hence his suit was lawfully dismissed.

12. In view of above discussion, **this appeal** being devoid of any merit **is dismissed**.

(Anwaar Hussain)
Judge

(Abid Aziz Sheikh)
Judge

Approved for reporting.

Judge