

HCJDA-38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

RSA No. 214 of 2015

Malik Pervaiz Majeed Shahzada

Versus

Rizwan Malik

JUDGMENT

<i>Date of hearing</i>	<i>16.09.2024</i>
<i>Appellant by</i>	<i>Mr. Muhammad Mehmood Chaudhary and Malik Muhammad Hanif, learned Advocates.</i>
<i>Respondent by</i>	<i>Mr. Shahid Farooq Gondal, Rana Attiq Ur Rehman, learned Advocates with Rizwan Malik-respondent.</i>

SULTAN TANVIR AHMAD, J:—This second appeal, filed under section 100 of the Code of Civil Procedure, 1908 (the ‘**Code**’), is directed against judgment and decree dated 30.03.2015 passed by learned Additional District Judge, Wazirabad as well as judgment and decree dated 19.07.2011 passed by learned Civil Judge, Wazirabad.

2. The respondent instituted suit dated 16.02.2005 (the ‘**suit**’) for ejectment through specific performance of agreement to sell dated 28.12.2004 (the ‘**agreement**’) with the averments that the appellant agreed to sell the plot as described in the *suit* (the ‘**suit property**’) to the respondent against consideration of Rs. 475,000/-, out of which Rs. 200,000/- was paid and the remaining

consideration of Rs. 275,000/- (the '*remaining consideration*') was agreed to be paid by or before 15.02.2005 (the '*cut-off date*'), however, the appellant failed to fulfill his obligations. The *agreement* was admitted between the parties, whereas, the appellant denied any fault at his part in fulfillment of obligations under the *agreement* and disputed the willingness of the respondent to perform the agreement by the *cut-off-date*. Out of material proposition of law and facts disputed between the parties the learned trial Court framed the issues. On 19.07.2011 while giving issue-wise findings the learned trial Court decreed the *suit* in the following manners:-

“ Resultantly, the decree is granted in favour of the plaintiff, requiring him to deposit remaining sale price of Rs. 2,75,000/- within one month, after which he shall be entitled to get the execution and registration of sale deed in his favour....”

The appellant filed civil appeal No. 87 of 2011 on 30.07.2011 before the learned First Appellate Court, which was dismissed vide judgment and decree dated 30.03.2015. Being dissatisfied from the concurrent decisions, the present second appeal has been filed.

3. Mr. Muhammad Mehmood Chaudhary-learned counsel for the appellant has submitted that the learned two Courts below have failed to properly appreciate the concept that the time was of essence of the contract and default by the respondent in appearance before the concerned Sub-Registrar on the *cut-off date* disentitles him from the discretionary relief of specific performance. Mr. Shahid Farooq Gondal-learned counsel for the respondent has opposed the same and he stated that the respondent remained willing to discharge his

obligations within the agreed time period and then throughout the proceedings before the learned trial Court.

4. Learned counsel for the parties have also read the various parts of the evidence led before the learned trial Court in order to convince as to the following questions:-

1. *Whether the respondent had capacity to perform the agreement and if he remained willing to fulfill his obligations under the agreement?*
2. *Whether the learned Courts below are justified in grant of specific performance of the agreement instead of allowing double of the earnest money as per the stipulation in the agreement?*

The respondent produced Syed Muhammad Anwar Shah (Manager Allied Bank Limited) as PW-1, who deposed that amount equal to the *balance consideration* was withdrawn by the respondent on the *cut-off date* through cheque No. 39583836. He was subjected to cross-examination but hardly anything could be extracted from which any inference can be drawn that the respondent has not withdrawn the amount involved on the *cut-off date*. Rizwan Malik / the respondent appeared as PW-6. He stood by his stance adopted in the *suit*. The remaining PWs (i.e. PW-2, 3, 4, 5 and 7) also supported his stance. In order to disprove the same, learned counsel for the appellant has referred to application dated 15.02.2005 (the '*application*') given by the appellant containing some confirmation of the registry *moharrar* and a stamp of the Sub-Registrar, however, Mr. Muhammad Mehmood Chaudhary has conceded that the Sub-Registrar or the *moharrar* were never produced as witness. Section 22 of the Specific Relief Act, 1977 (the '*Act*') clearly provides that *the jurisdiction to decree specific performance is discretionary and the Court is not bound to*

grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principle and capable of correction by a Court of Appeal". This provision has repeatedly been interpreted by Courts. The discretion is required to be exercised keeping in view the facts and circumstances of each case and the terms of the relevant agreement. Exercise must not be arbitrary and has to be based on sound and equitable reasons. It is also equally settled that stipulation of double payment of earnest money, simultaneously, do no bar to exercise the discretion to grant specific performance and the agreement to sell does not cease to remain operative to have it enforced through the Court of law for obtaining transfer of the property¹.

5. The respondent had instituted the *suit* on 16.02.2005 i.e. a day after the *cut-off date*. He through his evidence remained successful in demonstrating with certainty that he had capacity to perform the *agreement*. The concerned branch manager produced the ledger in the learned trial Court to show that through banking instrument the respondent has withdrawn the *balance consideration* on 15.02.2005. This leaves no doubt that the respondent had capacity to perform the *agreement*. His willingness is reflected from the prompt and immediate institution of the *suit*. By that time no prejudice was caused to the appellant but somehow he himself kept on delaying the matter. Mr. Muhammad Mehmood Chaudhary -learned counsel for the appellant stated that the *agreement* pertains to the year 2005 and now in the year 2024 if the specific performance is granted in favour of the appellant, the same

¹ "Dr. Mian Anjum Habib and another Versus Waseem Ahmed Khan and another" (2014 SCMR 1621)

shall be violative of the law settled in “*Muhammad Abdur Rehman Qureshi*”² and “*Ms. Sara Bibi*”³ cases that the rule regarding time is essence in every contract of property was settled many centuries ago when the prices of real estate used to remain stagnant and its high time that this rule is revised in view of the rapid increase in the prices of the real estate market. Mr. Muhammad Mehmood Chaudhary -learned counsel for the appellant is correct in this submission, however, he failed to show it from the record that the delay is attributable to the respondent. As already has been discussed that the respondent wasted no time in instituting the *suit* and he has shown his capacity to perform the *agreement*. Almost in similar circumstances in “*Lehrasap Khan and 3 Others*”⁴ case this Court has already observed that even assuming that the seller did not approach the concerned Sub-Registrar, the prompt and immediate institution of the *suit* was a proof of readiness and willingness.

6. So far as the *application* instituted before Sub-Registrar is concerned, it is admitted position that no one from his office was produced in evidence as witness. A learned Division Bench, somewhat in the identical circumstances, in “*Taj Deen*”⁵ case reached to the following conclusion:-

“...The presence of vendors before the Sub-Registrar on the date fixed, the application which has been produced as mark ‘C’, was to be proved by summoning the Sub-Registrar who allegedly reported on 4-7-2005

2 “Muhammad Abdur Rehman Qureshi Versus Sagheer Ahmad” (2017 SCMR 1696)

3 “Ms. Sara Bibi Versus Muhammad Saleem and Others” (PLD 2021 Islamabad 236)

4 “Lehrasap Khan and 3 Others Versus Muhammad Sarwar Khan and another” (2002 YLR 3223)

5 “Taj Deen Versus Muhammad Tufail and Others” (2015 YLR 2562)

5(a) “Also see “Muhammad Sarwar alias Babar Versus Muhammad Yasin (Deceased) through L.Rs. and Others” (2024 MLD 467) and “Shaukat Ali and 3 Others Versus Javeed Qureshi and 5 Others” (2002 CLC 1578) (The applications before Sub-Registrar, which were returned to the applicants, were held to be not sufficient to prove readiness and willingness).

but no such procedure has been adopted. Furthermore, the plaintiff-appellant has filed the suit just one day after the expiry of date of maturity of agreement to sell....”

After reading of the record and considering the arguments, I am of the firm view that the learned two Courts below have rightly exercised their discretion to grant the relief which is already reproduced above and the stipulation as to double payment of earnest money by itself does not debar from exercising the such discretion.

7. The second appeal only lies in the High Court on the grounds that the decision is being contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the *Code* or law for the time being in force which may possibly have emanated an error or slip-up in the determination or decisiveness of the case on merits⁶. I have not observed any such illegality, therefore, this second appeal is ***dismissed***. No order as to costs.

(Sultan Tanvir Ahmad)
Judge

Announced on 07.10.2024.
Approved for reporting

Judge

J.A. Hashmi/-

6 “Gulzar Ahmad and Others Versus Muhammad Aslam and Others” (2022 SCMR 1433)