

JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

C. R. No. 26520 of 2019

Mst. Abida Rafique Ghouri through her legal heir Mst. Ambreena Azeem.

VERSUS

Syed Amjad Hussain Gillani and 03 others.

JUDGMENT

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| Date of Hearing | 29.04.2024 |
| Petitioners by: | Mian Muhammad Faheem Bashir, Advocate |
| Respondent No. 1 by: | M/s Muhammad Salman Masood and Muhammad Nisar Qammar, Advocates |
| Respondent No. 2 by: | Ms. Samia Syed, Advocate |
| Respondent No. 3 by: | Mr. Talat Mehmood, Advocate vice counsel |
| Respondent No. 4 by: | Proceeded ex parte vide Order dated 25.09.2023 |

ABID HUSSAIN CHATTHA, J. This Civil Revision assails the concurrent Judgments & Decrees dated 23.10.2017 and 04.02.2019 passed by Civil Judge and Additional District Judge, Lahore, respectively, whereby, the suit for specific performance of Respondent No. 1 (the “**Respondent**”) against Mst. Abida Rafique Ghouri impleaded through her legal heir (the “**Petitioner**”) was concurrently decreed.

2. Brief facts of this case are that the Respondent instituted a suit for specific performance based upon written agreement to sell dated 05.02.2014 (the “**Agreement**”) against the Petitioner for purchase of triple storey house bearing No. 167/M, measuring 13.5 Marlas situated at Gulberg-III, Lahore (the “**suit property**”). It was alleged that out of total sale consideration of Rs. 12-Million, the Respondent paid Rs. 05-Million as earnest money and the remaining sale consideration of Rs. 07-Million was payable at the time of execution of sale deed or transfer of the suit property with target date of 05.05.2014. It was also asserted that the Petitioner provided a copy of transfer letter in her favour regarding the suit property issued by LDA (Respondent No. 3) dated 06.11.1991 and after due diligence, it was confirmed that the suit property was in the name of the Petitioner and free

from all kinds of liabilities. Before the target date, the Respondent issued cross cheque bearing No. 1486014 dated 02.05.2014 in favour of the Petitioner and provided a copy of the same to her with the request to initiate the process of transfer of the suit property and receive the balance sale consideration as per her own choice. However, the Petitioner deliberately lingered on the execution of sale deed on one pretext or the other despite repeated requests and also did not pay the double amount of earnest money in case of her refusal to transfer the suit property as stipulated in the Agreement. Even, Respondent No. 2, property dealer, who had guaranteed the due execution of the sale transaction, was also contacted but in vain. As such, on account of failure of the Petitioner to perform her part of the Agreement, the Respondent has suffered huge loss. Hence, this suit.

3. The Petitioner, in her written statement, admitted the due execution of the Agreement and receipt of earnest money. However, it was alleged that balance sale consideration was not paid on or before the target date despite her repeated requests and as such, the Agreement stood rescinded as per its terms. It was also asserted that the Petitioner issued three notices dated 06.05.2014, 14.05.2014 and 22.05.2014, respectively, in this behalf which were not responded to by the Respondent. It was further averred that she had purchased 01 Kanal property from one Mirza Tahir Baig for total consideration of Rs. 12,800,000/- and paid an earnest money of Rs. 4,100,000/- which was confiscated due to non-payment of remaining sale consideration by the Respondent within the stipulated target date of 15.05.2014 and as such, she has suffered irreparable loss and injury. It was next revealed that the Respondent arranged only Rs. 2,100,000/- as balance sale consideration out of Rs. 07-Million which was deposited in her account without her consent and the same was later returned to the Respondent through cheque bearing No. 1409227 dated 02.06.2014 because he did not fulfill his obligation to pay the balance sale consideration within the target date. As such, the Respondent is neither entitled to receive the double amount of earnest money nor the relief of specific performance of the Agreement.

4. Respondent No. 2, the property dealer, in his written statement also admitted the due execution of the Agreement between the Petitioner and the Respondent including payment and receipt of earnest money. He asserted that he provided a copy of cheque qua balance sale consideration issued by the Respondent to the Petitioner and asked her to initiate the process of transfer of the suit property but she showed her continuous reluctance and refused to transfer the same as well as pay back double amount of earnest money. As such, Respondent No. 2 supported the version of the Respondent to the effect that the Petitioner did not perform her part of the Agreement.

5. Out of the divergent pleadings of the parties, the Trial Court framed the following issues on 02.06.2015:-

1. *Whether the plaintiff is entitled to the decree for specific performance of agreement to sell dated 05-02-2014 as prayed for? OPP*
2. *Whether the plaintiff is entitled to receive double earnest money amounting to Rs.1,00,00,000/- on account of failure of defendant No.2 to perform her part of agreement to sell? OPP*
3. *Whether the plaintiff was willing and still ready to perform his part of contract? OPP*
4. *Whether the time was essence of the contract and the plaintiff failed to pay the remaining consideration of Rs.70,00,000/- within three months i.e. till 05-05-2014, hence the agreement to sell dated 05-02-2014 has become rescinded? OPD1*
5. *Whether the plaintiff has no cause of action to file the instant suit against the defendants? OPD*
6. *Whether the suit of the plaintiff is not maintainable in its present form, hence the same is liable to be dismissed with special costs? OPD*
7. *Relief.*

6. After recording respective evidence of the parties, the Trial Court proceeded to Decree the suit of the Respondent. The Petitioner preferred an Appeal which was also dismissed by the Appellate Court. Hence, this Civil Revision.

7. Learned counsel for the Petitioner contended that the Courts below have not addressed the question of readiness and willingness on the part of

the Respondent to perform his part of the Agreement and his financial ability to pay the balance sale consideration on or before the target date as it was proved from bank statement of the Respondent (Ex. P-3) that he never had requisite funds to pay the balance sale consideration. The Respondent had not specifically pleaded in the plaint that he was always ready and willing to perform his part of the Agreement and had financial ability to pay the balance sale consideration within the target date. Specific performance is a discretionary relief and in the instant case, the same has not been awarded through structured discretion exercised by the Courts below. This is evident from the fact that at the time of filing of the suit, no tangible effort was made by the Respondent to deposit the balance sale consideration and the same was paid after one year from the date of institution of the suit in compliance with the order dated 22.05.2015. The lack of financial ability of the Respondent to pay the balance sale consideration on or before the target date is evident from his conduct supported by interim orders on record. The observations of the Courts below to the effect that the suit property was mortgaged cannot be read in evidence as no such plea was taken by the Respondent in his plaint and as such, evidence beyond pleadings could not have been made basis to hold that the Petitioner was in default of her part of the Agreement.

8. Conversely, learned counsel for the Respondent contended that the Respondent specifically pleaded in his plaint that he had performed his part of the Agreement, whereas, the Petitioner did not perform her part of the Agreement which was also endorsed by Respondent No. 2 who was a guarantor of the sale transaction. The payment of Rs. 2,100,000/- to the Petitioner was made merely to facilitate her in redeeming the suit property which though returned yet proves that the Respondent had financial resources to pay the balance sale consideration. The cross cheque was issued in a bonafide manner requiring the Petitioner to initiate the process of transfer of the suit property and take the balance sale consideration as per her choice at the time of execution of the sale deed or transfer of the suit property as agreed in the Agreement. However, the Petitioner neither took any step to initiate the process of transfer of the suit property by obtaining

no objection certificate from LDA nor redeemed the portion of the suit property in possession of the mortgagee. Hence, the concurrent findings of fact recorded by the Courts below are not liable to be reversed.

9. Arguments heard. Record perused.

10. The execution of the Agreement and receipt of earnest money is admitted. The dispute is essentially with respect to determination as to whether the Petitioner or the Respondent failed to perform her or his part of the Agreement. It is admitted on record that the Respondent as buyer of the suit property issued cross cheque dated 02.05.2014 in the name of the Petitioner before the target date of 05.05.2014, a copy of which was handed over to the Petitioner requiring her to initiate the process of transfer in the LDA. However, there is no evidence on record that the Petitioner applied for no objection certificate which was required for transfer of the suit property either through execution of sale deed or directly before the LDA. She also did not take any step for execution of the sale deed or transfer of the suit property in the LDA in the name of the Respondent. The balance sale consideration was payable at the time of execution of sale deed or transfer before the LDA as per the contents of the Agreement. Therefore, the plea that the Respondent did not have the financial ability to complete the transaction was immature and is based on assumption that he did not have requisite funds in the bank account regarding which he had issued the cross cheque in favour of the Petitioner because payment could have been made in cash or through pay order from another account or by any other means. The Petitioner was bound to initiate the process of sale transaction and may well have required the payment of balance sale consideration through pay order or cash or by any other mode at the time of execution of sale deed or transfer of the suit property before LDA but that time did not arrive due to lapse on the part of the Petitioner. The Petitioner had stated in her written statement that she had issued notices dated 06.05.2014, 14.05.2014 and 22.05.2014 but the same were not brought on record and were issued after the target date of 05.05.2014. Although, the Respondent had not pleaded that he paid Rs. 2,100,000/- to the Petitioner to facilitate her to clear the mortgage qua the suit property yet the same fact was revealed by the Petitioner in her written

statement, perusal thereof shows that the said amount was deposited by the Respondent in the bank account of the Petitioner on 28.05.2014 but the same was returned vide cheque dated 02.06.2014. Both the above dates are beyond the target date which depicts that the said amount was extended merely to redeem the mortgage over the suit property which had not been cleared before the target date. The Petitioner had clearly undertaken in the Agreement that the suit property was free from all charges or liens but Mark-D on record shows that the suit property had been mortgaged to one Abdul Sattar (the Petitioner in connected C. R. No. 32672 / 2022) on 30.09.2013, for a period of two years, redeemable on three months' notice upon payment of mortgage money. Notwithstanding the validity of the mortgage deed, as an attending circumstance, it is established that payment of Rs. 2,100,000/- was infact for redeeming the mortgage since the amount of Rs. 2,100,000/- matches with the amount of mortgage money and further proves that the factum of mortgage was not incorporated in the LDA record which shows the conduct of the Petitioner that she not only concealed the fact of mortgage in the Agreement but also failed to clear the suit property from all encumbrances before the target date. As such, the Petitioner was not in a position to hand over vacant possession of the suit property to the Respondent at the target date.

11. Record further depicts that vide Order dated 17.06.2014, the Trial Court granted restraining order in favour of the Respondent subject to deposit of remaining sale consideration. On 12.07.2014, counsel for the Respondent recorded his statement that the Respondent is ready to pay the remaining sale consideration and deposited original cross cheque in the name of the Petitioner with the stipulation that the Petitioner can encash the same and the Respondent would be liable for the consequences. However, learned counsel for the Petitioner refused to receive the same. Later, vide order dated 12.03.2015, the Trial Court directed the Respondent to deposit the balance sale consideration in the Court within one month. After settling mode of payment through subsequent orders, the Trial Court vide order dated 22.05.2015 granted absolute last opportunity to the Respondent to deposit the balance sale consideration within thirty days and in compliance

thereof, the same was paid in the Court. Under these circumstances, it cannot be conclusively conferred that the Respondent did not have financial ability to complete the sale transaction. This is especially so since the Respondent had promptly instituted the suit on 17.06.2014 i.e. 1-1/2 months after the target date. The Petitioner, in her written statement, while admitting the transaction did not seek immediate payment of remaining sale consideration by demonstrating her willingness to execute sale deed but sought rescission of the Agreement.

12. The Trial Court while rendering its finding as to whether time was essence of the Agreement, concluded that the alleged sale transaction by the Petitioner with Mirza Tahir Baig could not be proved by the Petitioner who as DW-1 deposed regarding her ignorance with respect to the agreement with Mirza Tahir Baig as the same was executed by her deceased son. Further, the alleged agreement with Mirza Tahir Baig (Ex. D-1) allegedly executed on 11.02.2014 neither mentioned the names of the marginal witnesses nor the said Mirza Tahir Baig was produced as a witness to verify its contents. As such, the asserted fact by the Petitioner that she has suffered injury for lack of payment of balance sale consideration on due date by the Respondent and that time was essence of the Agreement was not proved by her.

13. The upshot of the above discussion is that the Courts below have rendered well-reasoned and sound Judgments after due appreciation of evidence and taking into account all aspects of the case. The concurrent Judgments passed by the Courts below are unexceptional which require no interference by this Court in exercise of revisional jurisdiction under Section 115 of the Code of Civil Procedure, 1908.

14. In view of the above, this Civil Revision is devoid of any merit and the same is hereby **dismissed**.

(Abid Hussain Chattha)
Judge

Approved for reporting.

Judge