

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

Civil Revision No.233690 of 2018

**Mst. Qamar Bibi (Late) through her Legal Heirs
Versus
Shahab-ud-Din & another**

JUDGMENT

Date of hearing: 28.02.2024.

Petitioners by: Mr. Hyder Ali Khan, Advocate.

Respondents by: Ch. Zulfiqar Ali, Advocate for respondent No.1.

Mr. Ghulam Farid Sanotra, Advocate for respondent No.2 (petitioner in connected case i.e. **C.R. No.222680 of 2018**).

MUHAMMAD SAJID MEHMOOD SETHI, J.:- This consolidated judgment shall dispose of instant revision petition along with following connected petition as common questions of law and facts are involved in these cases:-

C.R. No.222680 of 2018 titled *Muhammad Iqbal v. Shahab-ud-Din & others*

2. These revision petitions are directed against judgment & decree dated 21.05.2018, passed by learned Additional District Judge, Lahore, whereby respondent No.1's appeal against Trial Court's judgment & decree dated 21.11.2015 dismissing respondent No.1's suit for possession through specific performance of agreement to sell, was allowed and aforesaid suit was decreed.

3. Necessary facts of the case are that respondent No.1 filed suit for possession through specific performance of agreement to sell dated 02.04.2005 along with permanent injunction, which was contested by petitioner Mst. Qamar Bibi (since deceased) as well as respondent No.2 Muhammad Iqbal by way of filing their respective written statements. Trial Court, after framing issues, recording evidence and hearing arguments of learned counsel for the parties, proceeded to dismiss the suit to the extent of specific performance of agreement to

sell, whereas decreed it to the extent that respondent No.1 was held entitled to recover earnest money of Rs.700,000/- from petitioner. In appeal filed by respondent No.1, learned Additional District Judge, vide judgment & decree dated 21.05.2018, set aside Trial Court's decision dated 21.11.2015 and decreed respondent No.1's suit for possession and specific performance of agreement to sell with permanent injunction in the manner that he was held entitled to get vacant possession of the suit property and transaction taken place during pendency of suit in favour of respondent No.2 Muhammad Iqbal vide registered sale deed No.3774 dated 19.05.2008 was declared ineffective, respondent No.1 was directed to pay the balance sale consideration i.e. Rs.13,83,125/- within 30 days before Trial Court, in cash to be paid to petitioner, otherwise, appeal would be deemed to have been dismissed. Hence, these revision petitions.

4. Learned counsel for petitioner Muhammad Iqbal (respondent No.2 herein) submits that while decreeing the suit, the Appellate Court has misconstrued the contents of application under Order IX Rule 6 read with Section 151 CPC, filed by Mst. Qamar Bibi in suit for permanent injunction filed by respondent No.1, wherein she admitted execution of agreement to sell dated 02.04.2005, payment of earnest money of Rs.700,000/- and shown her readiness to execute sale deed upon payment of remaining consideration amount. He further submits that actually respondent No.1 never responded and showed his willingness to pay balance sale consideration inasmuch as aforesaid statement / ground could not have been relied upon to decree a subsequent suit, which ought to have been decided on its own merits. He adds that suit in hand was based upon *mala fide* intention, in order to prolong the litigation as such demonstrating zero readiness to make the balance payment for the purpose of getting sale deed registered. He contends that grant of decree of specific performance of agreement to sell is a discretionary relief, which can be withheld even if the execution of agreement to sell is proved. He argues that the Appellate Court must give reasons to differ with the findings of Trial Court, whereas, in the instant case, the Appellate court has failed to adhere to the provisions of Order XLI Rule 31 CPC and has not given issue-wise

findings. In support, he has referred to Jamil Akhtar and others v. Las Baba and others (PLD 2003 Supreme Court 494), Province of the Punjab through Collector District Khushab, Jauharabad and others v. Haji Yaqoob Khan and others (2007 SCMR 554), Pakistan Refinery Ltd., Karachi v. Barrett Hodgson Pakistan (Pvt.) Ltd. and others (2019 SCMR 1726), Minhaj-ul-Islam Sabri through General Attorney v. Mrs. Soofia Munir and 7 others (2006 CLC 1352), Mst. Sikandar Jahan and 4 others v. Mst. Ghulam Zainab and 10 others (2013 CLC 228) and Syed Ayoob Ali Shah v. Mst. Rabia Begum (2013 CLC 419). Learned counsel for petitioners in this case has adopted the above arguments.

5. Conversely, learned counsel for respondent No.1 defends the impugned appellate judgment & decree by contending that respondent No.1 is *bona fide* purchaser of the suit property, who performed his part of the agreement, whereas it was petitioner Mst. Qamar Bibi (since deceased) who failed to do the needful and acted *mala fide* by not receiving the remaining sale consideration. He maintains that when Mst. Qamar Bibi herself admitted in previous suit filed by respondent No.1 to execute sale deed after receiving the balance sale consideration, thus, the Trial Court should have decreed the suit in terms of Order XII Rule 6 CPC and Articles 81 and 113 of the Qanbun-e-Shahadat Order, 1984 instead of rejecting the plaint under Order VII Rule 11 CPC. He submits that the Appellate Court is not bound to render issue-wise findings in each and every case. In support, he referred to Abdul Karim v. Haji Noor Badshah (2012 SCMR 212), Mst. Sardar Begum & 5 others v. Muhammad Ilyas and another [PLJ 2013 SC (AJ&K) 340 (DB)], Miran Bakhsh through L.Rs. and 6 others v. Ali Muhammad (2013 MLD 142), Muhammad Bakhash and 2 others v. Inayat Bi and 13 others (2021 YLR 1562) and Iftikhar Ali and others v. Riaz-ul-Haq alias Riaz Ahmed and others (2023 YLR 854).

6. Arguments heard. Available record perused.

7. Admittedly, parties entered into agreement to sell dated 02.04.2005, earnest money of Rs.700,000/- was paid to Mst. Qamar Bibi (since deceased), the target date to finalize the transaction was

01.06.2005 and suit for specific performance of the agreement to sell was filed on 03.03.2007. The main stance of petitioners is that respondent No.1 could not arrange the remaining sale consideration within target date and also did not show his readiness to pay at any subsequent stage whereas the version of respondent No.1 is that Mst. Qamar Bibi (since deceased) was not willing to deliver possession of suit property and receive the sale consideration and lapse was on her part to perform her part of obligation. Record shows that earlier respondent No.1 filed suit for permanent injunction to restrain Mst. Qamar Bibi (since deceased) to further alienate the suit property, plaint whereof was rejected vide order dated 28.02.2007 with the observation that the said suit was not maintainable on the basis of agreement to sell as the proper form was to file suit for specific performance of agreement to sell. The moot point for determination by this Court is whether respondent No.1 expressed his willingness and readiness to pay the remaining sale consideration or the lapse was on the part of Mst. Qamar Bibi (since deceased).

8. The Appellate Court has mainly relied upon the contents of application under Order IX Rule 6 read with Section 151 CPC, moved by Mst. Qamar Bibi (since deceased) seeking setting aside of *ex parte* proceedings, to decree the suit wherein she offered and showed her readiness to execute registered sale deed subject to deposit of remaining sale consideration. Admittedly, said offer was not responded positively by respondent No.1 and owing to this lapse and previous conduct as highlighted in preceding paragraphs, the suit could not have been decreed in his favour. Learned Trial Court, after thoroughly examining the evidence adduced by the parties has also noted that respondent No.1 has failed to prove that he contacted Mst. Qamar Bibi/ defendant for transfer of the suit property and she refused to perform her part of the obligation. The relevant observations are reproduced as under:-

“9.... Regarding the remaining amount there is nothing on record which could suggest that the plaintiff was ready to pay the remaining amount and when the plaintiff is at fault or not paying the remaining consideration amount then the defendant is at liberty to sell the said suit property to anybody else. Furthermore, in his whole evidence he

has failed to prove that he has contacted with the defendant for the transfer of the suit property and the defendant No.1 was at default for non transferring the suit property. On the other hand from the whole available evidence it is clear that the plaintiff is at default of non payment of the remaining consideration amount, so under these circumstances as well as the case law submitted by the defendant, the plaintiff is not entitled for the relief of specific performance of contract.....”

9. It is evident that respondent No.1 did not opt to deposit the balance amount in the Court, which may help the Court to establish that he was not at fault. The available record also does not show that respondent No.1 ever made any positive attempt to pay the balance sale consideration to Mst. Qamar Bibi (since deceased) and she refused to accept the same. It is now well-settled that even where the vendor refuses to accept the sale consideration amount, the vendee seeking a specific performance of the agreement to sell is essentially required to deposit the amount in the Court, which demonstrates his / her capability, readiness and willingness to perform the obligation, which elements are missing in the instant case. Failure on the part of respondent No.1 to meet the said essential requirement disentitles him to the relief of specific performance. In these circumstances, there was no justification left with the Appellate Court to decree the suit and permit respondent No.1 to tender the balance sale consideration after a lapse of about 13-years. Reference can be made to Messrs Kuwait National Real Estate Company (Pvt.) Ltd. and others v. Messrs Educational Excellence Ltd. and another (2020 SCMR 171), Muhammad Yousaf v. Allah Ditta and others (2021 SCMR 1241) and Masood Ahmad Bhatti and another v. Khan Badshah and another (2024 SCMR 168).

10. Section 24 of the Specific Relief Act, 1877 details the contracts which cannot be specifically enforced and section 24(b) provides that specific performance of a contract cannot be enforced in favour of a person who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed. Respondent No.1 has failed to prove his readiness to perform his part of obligation through any supporting evidence. Likewise, as per Section 54 of the Contract Act, 1908 when a

contract consists of reciprocal promises, then second promise cannot be insisted to be done nor failure thereof can be claimed for damages or as a ground to fail the agreement unless it is established that the first promise was done. In this case, time was essence of the contract, the consequence was to be in accordance with the agreement but the Appellate Court has ignored this fact and further when fault was with the vendee-plaintiff he was absolutely not entitled for the discretionary relief in the shape of a decree for specific performance. Reliance is placed upon Muhammad Asif Awan v. Dawood Khan and others (2021 SCMR 1270), Muhammad Aslam and others v. Muhammad Anwar (2023 SCMR 1371) and Muhammad Ramzan v. Muhammad Ali and 13 others (2016 MLD 1255).

11. Needless to say that there is no provision in the Specific Relief Act, 1877, which casts any duty on the Court or requires the vendee to first deposit the balance sale consideration upon filing of the suit seeking specific performance of an agreement in respect of an immovable property. However, the relief of specific performance is discretionary and based on the principles of equity, thus, cannot be claimed as a matter of right. Therefore, the Court in order to ensure the *bona fide* of the vendee at any stage of the proceedings may put him to terms. Furthermore, such plaintiff is not only supposed to narrate in the plaint his readiness and willingness to fulfill his part of the agreement but also is bound to demonstrate through supporting evidence such as pay orders, Bank statement or other material, his ability to fulfill his part of the deal leaving no doubt in the mind of the Court that the proceedings seeking specific performances have been initiated to cover up his default or to gain time to generate resources or create ability to fulfill his part of the deal. It was, for this reason, mandatory for the plaintiff to prove that at the relevant time he had sufficient money to pay the remaining sale price. Another rationale behind is 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 endeavor 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. Reliance is placed upon Mst. Samina Riffat and others v. Rohail Asghar and others (2021 SCMR 7), Muhammad Jamil and others v. Muhammad Arif (2021 SCMR 1108) and Mst. Rehmat and others v. Mst. Zubaida Begum and others (2021 SCMR 1534).

12. Undoubtedly, execution of agreement to sell is admitted in the instant case and perhaps compliance of Article 17(2) read with Article 79 of the Qanun-e-Shahdat Order, 1984 is not required on the ground that admitted facts need not to be proved, however the observation of the Appellate Court that scribe could replace the requirements of producing other marginal witness is legally defective and hardly sustainable as for the grant of a decree plaintiff, inter-alia, has to prove the agreement to sell by producing two marginal witnesses. It is settled law that an agreement to sell an immovable property squarely falls within the purview of the provisions of Article 17(2) of the Qanun-e-Shahadat Order, 1984 and has to be compulsorily attested by the two witnesses and this is sine qua non for the validity of the agreement. For the purposes of proof of such agreement involving financial obligation it is mandatory that two attesting witnesses must be examined by the party to the lis as per Article 79 of the Order ibid. Article 79 is reproduced hereunder for ease of reference:-

"If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive and subject to the process of the Court and capable of giving evidence."

This Article in clear and unambiguous words provides that a document required to be attested shall not be used as evidence unless two attesting witnesses at least have been called for the purpose of proving its execution. The words "shall not be used as evidence"

unmistakably show that such document shall be proved in such and no other manner. The words "two attesting witnesses at least" further show that calling two attesting witnesses for the purpose of proving its execution is a bare minimum. Nothing short of two attesting witnesses if alive and capable of giving evidence can even be imagined for proving its execution. Construing the requirement of the Article as being procedural rather than substantive and equating the testimony of a Scribe with that of an attesting witness would not only defeat the letter and spirit of the Article but reduce the whole exercise of re-enacting it to a farce. Therefore, a scribe of a document can only be a competent witness if he has fixed his signature as an attesting witness of the document and not otherwise; his signing the document in the capacity of a writer does not fulfil and meet the mandatory requirement of attestation by him separately, however, he may be examined by the concerned party for the corroboration of the evidence of the marginal witnesses, or in the eventuality those are conceived by Article 79 itself not as a substitute. The purpose and object of the attestation of a document by a certain number of witnesses and its proof through them is also meant to eliminate the possibility of fraud and purported attempt to create and fabricate false evidence for the proof thereof and for this the legislature in its wisdom has established a class of documents which are specified, *inter alia*, in Article 17 of the Order, 1984. Reliance is placed upon Rafaqat Ali v. Muhammad Farid and others (2007 SCMR 1083), Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others (**PLD 2011 Supreme Court 241**), Farzand Ali and another v. Khuda Bakhsh and others (**PLD 2015 Supreme Court 187**), Farid Bakhsh v. Jind Wadda and others (**2015 SCMR 1044**), Sheikh Muhammad Muneer v. Mst. Feezan (**PLD 2021 Supreme Court 538**) and Muhammad Ghaffar (Deceased) through LRs and others v. Arif Muhammad (**2023 SCMR 344**).

13. It is notable that the Appellate Court did not bother to give any findings on the issues distinctly and further did not seem to have examined every aspect of the lis for recording its reasons to justify reversal of the adjudication made by the lower court. Moreover proper points of determination were also apparently not framed which was

mandatory while reversing the findings of the Trial Court, thus, substantial compliance of provisions of Order XLI Rule 31 CPC has not been made. A judgment should discuss and cover all substantial points involved in the case and also should reflect that Court has scanned and examined the material available on record minutely as well as evidence adduced by the parties supported with relevant documents pragmatically. Compliance of Order XLI Rule 31 C.P.C. is mandatory in its nature and the Appellate Court could not evade these provisions by taking divergent view on erroneous surmises and conjectural presumptions. Such a practice of the Appellate Court, if allowed, would frustrate the whole scheme of legislature by attributing redundancy to such mandatory provisions of law, which cannot be countenanced. Rationale behind said provision is that not only the party losing the case but the next higher forum may also understand what weighed with the Court in deciding the lis against it. Reliance is placed upon Muhammad Iftikhar v. Nazakat Ali (2010 SCMR 1868), Pakistan Refinery Ltd., Karachi v. Barrett Hodgson Pakistan (Pvt.) Ltd. and others (2019 SCMR 1726), Muzafar Iqbal v. Mst. Riffat Parveen and others (2023 SCMR 1652), Saeed Ullah Khan v. Muhammad Khalid and 3 others (2018 CLC 648), Muhammad Yousuf through Legal Heirs and 6 others v. Abdul Jabbar Qureshi through Legal heirs and 18 others (2019 YLR 1558) and Ali Muhammad and 4 others v. Learned Additional District Judge-III, Dadu and 14 others (2020 CLC 365).

14. Learned counsel for respondent No.1 has referred to Order XII Rule 6 CPC and Articles 81 & 113 of the Qanun-e-Shahadat Order, 1984 to contend that in view of admission of Mst. Qamar Bibi (since deceased) in her application under Order IX Rule 6 read with Section 151 CPC (filed in respondent No.1's suit for permanent injunction), the suit should have been decreed by the Trial Court binding respondent No.1 to pay the balance sale consideration. This argument is not tenable for the reasons: *firstly*, the admission was conditional subject to payment of balance sale consideration, therefore, it was incumbent upon respondent No.1 to respond to said offer and make payment of balance sale consideration; and *secondly*, no doubt, Order

XII Rule 6 CPC provides for powers of the Court to pass judgment on admissions but for returning such a judgment, the admission has to be clear, unambiguous, unqualified and unequivocal as held by the Hon'ble Supreme Court of Pakistan in the case reported as Messrs Kuwait National Real Estate Company (Pvt.) Ltd. and others v. Messrs Educational Excellence Ltd. and another (2020 SCMR 171) which is not the case here because Mst. Qamar Bibi (since deceased) asserted lapse on part of respondent No.1 to perform his part of the obligation and then made an offer to execute registered sale deed subject to payment of sale consideration. Furthermore, the Court when faced with such an eventuality has to exercise its discretion in a judicial manner, subject to qualification regarding maintainability of suit on any legal objection going to the very root of the matter. Needless to say that the Court can even require evidence regarding admission, in its discretion as provided by Article 113 of the Qanun-e-Shahadat Order, 1984. Reference can also be made to Zafar Ali v. Allah Bachayo (PLD 1989 Supreme Court 294) and Muhammad Zarin v. Amir Dil Khan and others (2022 MLD 1439).

15. The case law relied upon by learned counsel for respondent No.1, being on distinguishable facts and circumstances, is not applicable to the present scenario.

16. Resultantly, these revision petitions are allowed, impugned judgment & decree dated 21.05.2018 is set aside. Consequently, Trial Court's judgment & decree dated 21.11.2015 is restored.

(Muhammad Sajid Mehmood Sethi)
Judge

APPROVED FOR REPORTING

Judge

* Sultan /A.H.S. *