

Judgment Sheet
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

R.S.A. No.64508 of 2022

Asim Jamshaid

Versus

Shahzad Iqbal Malik, etc.

JUDGMENT

Date of Hearing	28.03.2023
For the appellant	Sh. Naveed Shahryar, Advocate
For Respondent No.1	Nemo
For Respondents No.2 & 3	Mr. Wasim Ahmad, Advocate

Raheel Kamran J:- The appellant/ plaintiff has assailed the judgments and decrees dated 18.11.2021 and 02.09.2022 passed by the learned Civil Judge 1st Class, Lahore and learned Additional District Judge, Lahore respectively whereby specific performance of agreement to sell dated 22.03.2013 was refused, however, defendant No.1 was directed to pay double the earnest money to the plaintiff alongwith profit at bank rate since 22.03.2013 when the earnest money was paid alongwith return of the remaining amount of consideration deposited in the Court by the appellant.

2. The facts giving rise to this appeal are that the appellant entered into an agreement to sell with respondent No.1 on 22.03.2013 in respect of plot No.436 measuring 10 Marlas, Block-D, Army Welfare Trust Phase-II, Lahore for a

consideration of Rs.1,250,000/- . The appellant paid a sum of Rs.100,000/- in cash as earnest money and the balance of sale consideration was agreed to be paid on or before 27.03.2013. The plaintiff allegedly made several requests to defendant No.1 to perform his part of the contract as he was ready to pay him the remaining sale consideration, however, he delayed the matter on one pretext or the other. It was further averred in the plaint that the plaintiff also deposited all the dues required for transfer of the suit property with defendant No.2 and requested defendant No.1 to come to the office of defendant No.2 but he did not turn up constraining the plaintiff to file the suit. The suit was instituted on 18.09.2014, which was contested by the defendant No.1 who filed his written statement. It was during pendency of the suit, that the plaintiff deposited the remaining sale consideration on 17.10.2014 on direction of the trial Court. Out of the divergent pleading of the parties, issues were framed and evidence was recorded. After consideration of the record, learned trial Court, while declining specific performance of the agreement, directed defendant No.1 to pay an amount of Rs.214,000/- to the plaintiff with 10% annual mark up from the date of this judgment till the payment or realization of the amount. Feeling aggrieved, the plaintiff preferred appeal before the learned Additional District Judge, Lahore, which was partly accepted and by modifying the judgment and decree of the learned trial Court directed defendant No.1/respondent No.1 to pay double the earnest money of Rs.100,000/- to the plaintiff alongwith profit at the bank rate since 22.03.2013 when the said amount was paid.

3. Learned counsel for the appellant contends that the learned Courts below were bound to decree the suit qua specific performance *inter se* the appellant and respondent No.1 notwithstanding clause-8 in Ex.P-1 providing for payment of double the earnest money in case of refusal of respondent No.1

to transfer the property, subject matter of the sale. In support of his contention, he has placed reliance on the case of *Muhammad Latif Khokhar vs. Abdul Latif Khan and another (2018 CLC Note 40)* and *Mrs. Mussarat Shaukat Ali vs. Mst. Safia Khatoon and others (1994 SCMR 2189)*.

4. Conversely, learned counsel for respondents No.2 & 3 states that there is no stipulation in the agreement to sell to the effect that in case of failure of respondent No.1 to perform the contract, the same would be specifically enforceable. Reliance in this respect is placed on the case of *Muhammad Siddique and 6 others vs. Abdul Aziz Ratalvi and 7 others (2016 YLR 612)* (**Supreme Court AJ&K**). Respondent No.1 has already been proceeded against *ex-parte* vide order dated 13.02.2023.

5. Heard. Record perused.

6. The parties entered into an agreement to sell on 13.03.2013 with respect to a plot measuring 10 marlas against a consideration of Rs.1,250,000/- out of which an amount of Rs.100,000/- was paid as earnest money and the remaining consideration was to be paid on or before 27.03.2013. There was a condition specified in clause-8 of the agreement that the seller shall pay double the earnest money if he backs out from the sale and likewise if the purchaser backs out, his advance money was not to be refunded. Section 19 of the Specific Relief Act, 1877 gives right to claim compensation to the person suing for specific performance of contract in addition to or in substitution for its breach. The said section is reproduced hereunder for ready reference: -

"19. Power to award compensation in certain cases.
Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation

for that breach, it shall award him compensation accordingly.

If in any such suit the Court decides that specific performance out to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

Explanation.-The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.”

The relinquishment of right to seek specific performance of contract is to be decided keeping in view the conduct of the parties and evidence led in this respect. Reliance in this regard is placed on the case of Mrs. Mussarat Shaukat Ali vs. Mst. Safia Khatoon and others (1994 SCMR 2189).

7. The learned trial Court arrived at the conclusion that it was the plaintiff who remained fail to perform his part of the contract within time whereas the learned Appellate Court put this responsibility on the shoulder of the defendant and maintained that the plaintiff was only entitled to recover double the earnest money with profit at the bank rate keeping in view the condition No.8 of the agreement.

8. It is well settled that the grant of relief of specific performance of contract is discretionary in nature which cannot be exercised arbitrarily. The Courts are not bound to grant relief of specific performance of contract merely because it is lawful to do so. It is essentially an equitable relief and can be declined if the Court reaches the conclusion that it is unjust and inequitable to do so. This principle has been provided in section 22 of the Specific Relief Act, 1877, which is reproduced as under: -

“22. Discretion as to decreeing specific performance.
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 principles and capable of correction by a Court of appeal.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance.

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff."

9. In the instant case, the agreement between the parties contained a specific date i.e. 27.03.2023 for its performance with consequences of delay in clause-8 to the effect that in case of failure of the seller to perform his part of the agreement, he would pay double the earnest money and if the purchaser failed to perform his obligation, his earnest money would be confiscated. No procedure was provided in the agreement for extension of time for performance of the contract. The agreement was executed on 22.03.2013 and remaining sale consideration was to be paid on 27.03.2013. A short date was fixed for performance of the contract meaning thereby that time was essence of the contract. Now it is to be seen whether the plaintiff proved that he had offered payment of remaining sale consideration to the defendant. One of the plaintiff's witnesses namely Muhammad Ilyas (PW-2) stated that on 27.03.2013 he and the plaintiff went to the society's office with the remaining sale consideration where the plaintiff contacted defendant through telephone whereas the plaintiff (PW-1) stated that Muhammad Ilyas did not accompany him to the society's office. The other witness Muhammad Zeeshan (PW-3) deposed that on 27.03.2013 he was in his house and could not meet the plaintiff. Although the witnesses stated that the plaintiff had offered balance amount to the defendant yet keeping in view the

contradiction mentioned above, the same cannot be given any weight. Moreover, no bank statement showing balance to pay the remaining consideration was produced in evidence. The suit was instituted on 18.09.2014 (after 18 months of the date specified for performance of the contract) whereas the remaining sale consideration was deposited in the Court on 17.10.2014 and that too on direction of the Court. Having the balance money in hand on 17.10.2014 does not mean that the appellant had it on 27.03.2013.

10. The learned Appellate Court has relied on the admission of defence witnesses in their cross-examination regarding availability of defendant at Kashmir on the fateful day for declaring him liable for non-performance of the contract, however, the primary responsibility to show readiness and willingness to perform his part of the reciprocal obligation was that of the appellant who was seeking the relief of specific performance of the contract, which he clearly failed to establish in this case.

11. While relying on cross-examination of DW-1, the learned trial Court noted that the suit plot was purchased by respondent No.1 for Rs.900,000/- in October, 2012 and after five months he bargained to sell it for Rs.1,250,000/-. Only a few days time was provided to the appellant for payment of the balance sale consideration on 27.03.2013 in the agreement to sell dated 22.03.2013 for the sale of suit property, which was deposited in the Court by the appellant on 17.04.2014. In the given facts and circumstances, the agreement dated 22.03.2013 could not be construed to infer consent of respondent No.1 to sell the suit property with all its potential for rapid increase in value for the payment of consideration of Rs.1,250,000/- to be paid on 17.10.2014. Such a construction would give an unfair advantage to the appellant over his rival which cannot be countenanced in law. Reliance in this regard is placed on the case of Muhammad

Abdur Rehman Qureshi vs. Sagheer Ahmad (2017 SCMR 1696). The case law relied upon by the appellant is distinguishable on facts. Accordingly, this Court is of the considered opinion that in the facts and circumstances of the instant case, discretionary relief of specific performance cannot be extended in favour of the appellant. As regards the relief granted to the appellant by the Appellate Court qua payment of double the earnest money of Rs.100,000/- alongwith profit at the bank rate since 22.03.2013 when the amount was paid, since the impugned decree has not been assailed by respondent No.1 before this Court, therefore, the same is not liable to any interference.

12. For the foregoing reasons, this appeal is **dismissed**. There shall be no order as to costs.

**(RAHEEL KAMRAN)
JUDGE**

Saeed Akhtar