

Stereo. H C J D A 38.
JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.5252/2023

Muhammad Afzal versus Asia Zaheer

J U D G M E N T

Date of Hearing:	04.10.2023
Petitioner by:	Mr. Mubashar Iqbal, Advocate.
Respondent by:	Mian Tariq Mehmood, Advocate.

Anwaar Hussain, J. This petition under Section 115, Code of Civil Procedure, 1908 arises out of the suit for specific performance of agreement to sell dated 31.08.2020 (“**the agreement**”) instituted by the petitioner against the respondent that was dismissed by the Trial Court, *vide* judgment and decree dated 26.04.2022 and the said finding was upheld, *vide* judgment and decree dated 07.11.2022, by the Additional District Judge, Faisalabad. Both the Courts below allowed the respondent to forfeit the earnest money paid by the petitioner under the agreement.

2. Mian Tariq Mehmood, Advocate has entered appearance on behalf of the respondent at the *limine* stage with permission of the Court. His power of attorney is also available on record, having been filed in the Office on 09.06.2023. With the consent of learned counsel for the parties, the case has been heard and decided as a *pacca* case.

3. By way of factual background, it has been noted that the petitioner instituted a suit, against the respondent, for specific performance of the agreement with the averments that the respondent agreed to sell his house measuring 2 *marla* 4 ½ sq. ft., situated in Tehsil City, District Faisalabad (“**the suit property**”),

detail whereof is given in para 2 of the plaint, for total price consideration of Rs.2,575,000/-, out of which a sum of Rs.650,000/- was paid as earnest money whereas the remaining amount was agreed to be paid on or before 01.01.2021. It was also agreed that the respondent shall get a gas meter installed at the suit property. The Trial Court directed the petitioner to deposit the balance sale consideration amounting to Rs.1,925,000/-, however, the petitioner only deposited a sum of Rs.1,800,000/- and withheld Rs.125,000/-, apparently, on account of non-installation of the gas meter, at the suit property, as per the agreement. The respondent after filing of the written statement was proceeded against *ex parte*. The Trial Court recorded *ex parte* evidence and finally dismissed the suit with the observation that the earnest money has been rightly forfeited by the respondent, *inter alia*, on the ground that the petitioner was bound to pay the remaining balance price till the cut-off date, under the agreement, i.e., 01.01.2021 and despite issuance of *fard proforma* (Exh.P2) for the execution of the registered sale deed in his favour, he has neither paid the entire balance amount to the respondent nor tendered the same in the Court despite passing of order by the Trial Court, therefore, he has committed breach of contract and is not entitled to specific performance thereof.

4. Learned counsel for the petitioner submits that the concurrent findings are result of mis-appreciation of record as also the applicable law, *inter alia*, for the reason that installation of the gas utility connection, at the suit property, was also one of the essential conditions of the agreement which admittedly, the respondent failed to discharge, therefore, breach of terms and conditions of the agreement lies on part of the respondent that has not been appreciated by the Courts below. Adds that this was also the precise reason for withholding Rs.125,000/- while depositing the balance sale price in compliance with the direction of the Trial Court.

Further avers that forthwith deposit of Rs.1,800,000/- upon the direction of the Trial Court indicates that the petitioner was always ready and willing to perform his part of the contract. Concludes that if the respondent was not willing to discharge his obligation to actualize the sale transaction, the agreement could have been struck off, however, it is a harsh decision to allow the respondent to forfeit substantial amount which the petitioner paid as earnest money at the time of execution of the agreement and prays that the same be returned to the petitioner.

5. Conversely, on a pointed question whether the respondent is willing to sell the house and can ensure installation of the gas connection, as per the agreement, learned counsel for the respondent submits that the respondent is not willing to sell the suit property to the petitioner even if the sale price is enhanced by this Court. Further submits that the petitioner is always at liberty to withdraw amount of Rs.1,800,000/- deposited with the Trial Court as held by the Courts below, however, the earnest money was liable to be forfeited in terms of the agreement as the petitioner committed breach by failing to pay the balance consideration price by the cut-off date and the Courts below have rightly held in this regard, in favour of the respondent.

6. Arguments heard. Record perused.

7. This case has simple and admitted facts. The respondent is owner of the suit property and while agreeing to sell the suit property through the agreement and receiving Rs.650,000/- as earnest money, also undertook that he shall get the gas meter installed in the suit property, which was not fulfilled by the respondent. The agreement reads as under:

”لذ فریق اول نے جانبیاً متذکرہ بالا کام سوداچ بعہ تعمیرات و تنصیبات میٹر بجلی، لال پمپ (گیس میٹر
گوا کر کر (sic) رینا) چالو حالت مبلغ پچیس لاکھ پچھتر ہزار- 25,75,000 روپے میں فریق دوئم سے طے

کر کے زریعانہ مبلغ چھ لاکھ پچاس ہزار/- 6,50,000 روپے نصف جنکے مبلغ -/ 3,25,000 روپے ہوتے ہیں رو برو گواہان حاشیہ بالعوض رسید فریق دو ٹم سے وصول کر لیا ہے۔۔۔۔۔ قصص ملکیت کی صورت میں من مظہر دوارثان من مظہر کی ذات وجایدہ ہمہ قسم ذمہ دار ہو گی اگر فریق اول دوارثان فریق اول نے اخراج کیا یا اقرار نامہ ہذا کی کسی بھی شرط سے مخالف ہو تو وصول شدہ زریعانہ کا دو گناہ جانہ فریق دو ٹم کو ادا کرنے کا پابند ہو گا۔

(Emphasis supplied)

When the petitioner approached the Trial Court for specific performance of the agreement, he was directed to deposit the total balance consideration price, however, he has withheld a sum of Rs.125,000/- from the balance sale price, on the ground that since an important stipulation regarding installation of the gas meter was not fulfilled by the respondent, the petitioner was justified to withhold the said amount as the respondent was obligated to handover possession of the suit property after getting the gas meter installed but the needful was not done even though a legal notice, to this effect, was issued to the respondent. When confronted with as to why the gas meter was not got installed as per the agreement, learned counsel for the respondent contends that there was a ban imposed on issuance/approval of gas utility connection by M/s Sui Northern Gas Pipeline Corporation Limited (“the SNGPL”), therefore, the needful could not be done.

8. The only point of determination that requires opinion of this Court is to examine whether the respondent is justified in forfeiting the advance amount/earnest money as the petitioner failed to pay the balance amount of consideration before the cut-off date and despite direction of the Trial Court to pay balance sale consideration of Rs.1,925,000/- withheld Rs.125,000/- out of the same, keeping in view the fact that installation of a gas meter was also an agreed term under the agreement, which the respondent admittedly failed to meet till date.

9. In the course of a sale transaction, the earnest money paid by the vendee is part of the purchase price when the transaction successfully goes through and is forfeited if and when the transaction falls through, by reason of the fault or failure of the vendee to pay the balance sale price on or before the cut-off date and in this regard the parties do include a stipulation in the sale contracts. The agreement, in the instant case, contains such a stipulation. However, at the same time, there was a condition in the agreement that the respondent would get installed the gas meter in the suit property, which remained unfulfilled by the respondent. Record depicts that the petitioner came forth to perform his part of reciprocal obligation to pay the balance sale consideration within period stipulated, through issuance of a legal notice calling upon the respondent to comply with term of the agreement pertaining to the installation of the gas meter. It has been noted that right from the inception of the execution of the agreement, the respondent failed to comply with the reciprocal obligation under of the agreement to get installation of the gas meter. Inclusion of the said condition in the agreement indicates that the petitioner was interested in purchasing the suit property with the gas meter installed therein and in the absence of the same, certainly the value of the suit property cannot be the same as agreed between the parties.

10. Admittedly, the gas meter has not been installed as of today and the respondent is not willing to discharge that obligation even if sale price is enhanced. One cannot lose sight of the fact that generally the agreements to sell do not contain a clause whereby it is stipulated that gas meter/connection shall be got installed by the seller, rather, the sales are made with the amenities/facilities like electricity or water connections, at the site/property, existing on the date of execution of an agreement. The incorporation of the said clause in itself indicates the intention of the parties that the said

term was material in reaching the *consensus ad idem*. Therefore, it runs counter to equitable principles to penalize the petitioner for failure of the respondent to fulfil material term of the agreement. Moreover, allowing forfeiture of the earnest money in favour of the respondent belies logic as this would amount to putting premium on failure of the respondent to fulfil his part of the agreement what seems to be material term thereof by the respondent himself. The Trial Court while thrashing out the evidentiary resume of the case has held that condition of installation of gas meter was not mandatory as no consequence thereof was stipulated for the non-installation ignoring the following part of the agreement:

”گرفیق اول و دارثان فریق اول نے انحراف کیا اقرار نامہ مذکور کسی بھی شرط سے منحرف ہوا تو صول شدہ
زربیانہ کا دو گناہر جانہ فریق دو گم کو ادا کرنے کا پابند ہو گا۔“
(Emphasis supplied)

The phrase ‘کسی بھی شرط سے منحرف ہوا’ includes the installation of the gas meter by the respondent and consequence thereof is also stipulated by obligation of the respondent to pay double the amount in the above quoted part of the agreement.

11. There is yet another dimension of the matter that also goes to the root of the case as well, having direct bearing on the nub of the matter, i.e., forfeiture of the earnest money. Learned counsel for the respondent has put forth the defence that gas meter could not be installed at the suit property because of the ban imposed by M/s SNGPL. On a pointed question, learned counsel for the respondent acknowledged that the ban was imposed after the cut-off date envisaged under the agreement. The respondent incorporated the condition of installation of gas meter when admittedly there was no ban imposed and no effort was made to get it installed and now that the ban has been imposed by M/s SNGPL, refuge is being taken before this Court on ground of imposition of ban. Meaning thereby

that incorporation of the stipulation in respect of the installation of gas meter appears to be a promise without intent to perform the same and hence, amounts to fraud as contemplated under Sub-Section (3) of Section 17 of the Contract Act, 1872 (“**the Act, 1872**”), which reads as under:

“17. **“Fraud” defined.** – “Fraud” means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract –

(1) ...

(2) ...

(3) a promise made without any intention of performing it.”

(Emphasis supplied)

Under Section 19 of the Act, 1872, if the agreement is based on fraud, the same is held to be voidable at the option of aggrieved person and from this perspective, it is the petitioner who is the aggrieved party and can seek the performance of the contract and/or avoid the same and in fact recover damages.

12. The above discussion raises a supplemental question that if the respondent is held to be in violation of his part of the agreement i.e., installation of gas meter, then whether the petitioner can be denied passing of decree of specific performance of the agreement in his suit. However, this is not apt so to consider for two fold reasons. Firstly, because the specific performance has been also denied on account of dereliction of petitioner to comply with the order of the Trial Court to deposit the total balance sale consideration, by withholding Rs.125,000/- . Secondly, during the course of arguments, learned counsel for the petitioner himself conceded that the petitioner would be satisfied if the impugned judgments are modified to the extent of forfeiture of the earnest

money, therefore, further analysis of the matter is not necessary. However, in view of the above discussion, this Court cannot shut its eyes upon the conduct of the respondent who admittedly agreed to get the gas meter installed in the suit property but did not honour his word, therefore, the respondent is not entitled to forfeit the earnest money of Rs.650,000/- paid by the petitioner to the respondent at the time of execution of the agreement, which aspect of the matter has gone unnoticed by the Courts below while passing the impugned judgments and decrees.

13. For what has been discussed above, the impugned judgments and decrees are maintained to extent of dismissal of the suit of the petitioner for specific performance, however, are modified to the extent that the petitioner is entitled to forthwith return of the earnest money of Rs.650,000/- by the respondent, which was undisputedly paid by him to the respondent at the time of execution of the agreement.

14. **Disposed of** in above terms.

(ANWAAR HUSSAIN)
Judge

Approved for reporting

Judge

Akram