Judgment Sheet
IN THE LAHORE HIGH COURT,
MULTAN BENCH, MULTAN

JUDICIAL DEPARTMENT

....

Regular First Appeal No.93 of 2021.

Malik Faisal Mahmood & another

Versus

Shahid Ali & others

JUDGMENT

DATE OF HEARING:	12.10.2023.
APPELLANTS BY:	M/s Malik Muhammad Akbar Bhutta and Attiq-ur-Rehman Khan, Advocates.
RESPONDENTS No.1-3 BY:	Malik Muhammad Ashfaq Ahmed, Advocate.
RESPONDENT No.4 BY:	Ch. Muhammad Jamil, Advocate.

MUHAMMAD RAZA QURESHI, J. This Regular First Appeal is directed against the Order and Decree dated 06.01.2021 passed by learned Civil Judge 1st Class/Trial Court, Multan pursuant whereto suit for specific performance of an agreement to sell bearing No.842 dated 06.05.2016 was dismissed on account of failure of the appellants/plaintiffs to deposit the balance sale consideration in compliance of directions issued by the Court.

2. Learned counsel for the Appellants submits that Impugned Order and Decree are illegal and unlawful as the learned Trial Court proceeded with undue haste to oust the appellants from

the contest. According to learned counsel, the Appellants were already ready and willing to perform their part of agreement, but their liability was interconnected with the reciprocity of the respondents/defendants as the nature and scope of the agreement to sell was bilateral in its scope and effect. According to learned counsel, the learned Trial Court failed to appreciate that a substantial sum of money had been paid as earnest money and on the cut-off date stipulated in the subject matter agreement to sell the appellants expressed their readiness and willingness through payment of balance sale consideration, which the respondents refused to accept.

3. Learned counsel has augmented that the judgment passed by the august Supreme Court of Pakistan as referred by the learned trial Court is inapplicable in the facts and circumstances of the case and Impugned Order and Decree are liable to be set aside. In support of his contentions, learned counsel has relied upon judgments reported as "*Mrs. ZAKIA HUSSAIN and another versus Syed FAROOQ HUSAIN*" (**PLD 2020 Supreme Court 401**), "*MUHAMMAD HUSSAIN and others versus Dr. ZAHOOR ALAM*" (**2010 SCMR 286**), "*Messrs PREMIUM DEVELOPERS through Chief Executive versus MUHAMMAD TARIQ*" (**2023 MLD 838**), "*MUHAMMAD JAMIL and others versus MUHAMMAD ARIF*" (**2021 SCMR 1108**), "*SAID MUHAMMAD versus ABDUR REHMAN*" (**1996 MLD 60**) and "*AGRA COOPERATIVE HOUSING SOCIETY LIMITED versus Syed AKHTAR ALI and others*" (**1994 MLD 1747**).

4. Conversely, learned counsel for the respondents submits that the primary test to be passed by the appellants was their readiness and willingness, which appellants throughout failed to satisfy. According to learned counsel, bare perusal of the agreement to sell reflects that its performance was only dependent upon the payment of balance sale consideration determined *inter se* parties to be paid on cut-off date. Learned counsel has assisted us by referring to the date of agreement to sell and date of institution of the suit to demonstrate that delay of 17 months itself speaks volumes about the conduct of the appellants. Adds that just by paying the meager earnest money the appellants cannot put the subject matter property under a clog. Contends that a suit for specific performance of agreement to sell is discretionary in its nature and scope wherein conduct of the parties plays a pivotal role and plaintiff(s) is/are expected to satisfy the test of law by substantiating his/their conduct through readiness and willingness to perform his/their part of agreement. In support of his contentions, learned counsel has relied upon "*NAZAR HUSSAIN and another versus Syed IQBAL AHMAD QADRI (DECEASED) through his L.Rs and another*" (**2022 SCMR 1216**), "*HAMOOD MEHMOOD versus Mst. SHABANA ISHAQUE and others*" (**2017 SCMR 2022**), "*FAROOQ IMRAN versus Group Captain (R.) NAEEM AHMAD SIDDIQUI*" (**2009 SCMR 157**) and "*ABDUS SALAM KHAN BARKI and another versus Mian PERVAIZ AKHTAR and another*" (**PLD 2022 Islamabad 346**).

5. We have heard learned counsel for the parties and perused the record with their able assistance, which reflects that

subject matter suit was instituted on 23.10.2018 wherein the appellants Malik Faisal Mahmood and Sohail Mahmood being vendees sought possession through specific performance of agreement to sell bearing No.842 dated 06.05.2016 (**agreement to sell**) against the respondents for the properties fully described/ enumerated in the plaint admeasuring 49-Kanals 05-Marlas 76-Feet situated in Mouza Bakher Arbi, Tehsil & District Multan.

6. The vendees pleaded through plaint that total sale consideration for the subject matter land was in the sum of Rs.200,078,000/-, out of which the appellants paid an amount of Rs.8,000,000/- as earnest money, whereas the balance sale consideration amounting to Rs.192,078,000/- was to be paid till the cut-off date i.e. 31.05.2017. The contents of plaint reflect that the respondents being vendors had to perform their part of agreement through granting permission to the vendees to construct a wall but they failed to do so. According to plaint, the appellants throughout expressed their readiness and willingness. They got prepared a bank draft for the balance sale consideration and approached the vendors, but they refused to transfer the subject matter land in favour of the appellants and this refusal culminated into a cause of action in favour of the appellants to institute the subject matter suit.

7. The learned Trial Court at the time of admission of suit granted injunctive relief to the Appellants through order dated 23.10.2018 and directed them to affix court fee of Rs.15,000/-, which was furnished by them on 05.01.2019. The matter remained pending for issuance of notices to the respondents when through order dated

22.04.2019 learned Trial Court first time ordered the appellants to deposit the balance sale consideration. Thereafter, matter kept lingering on one pretext or the other and through order dated 16.10.2020 learned Trial Court ordered the Appellants to deposit balance sale consideration within a period of two months with a caution that in case, the same was not deposited, the suit would be dismissed. The Appellants filed an application that the condition for deposit of balance sale consideration be replaced with surety bond. However, learned Trial Court pursuant to its order dated 06.01.2021 not only dismissed the said application having no plausible ground, but also dismissed the suit by invoking the penal provisions of Order XVII Rule 3 CPC because the Appellants despite availing three fair opportunities failed to deposit balance sale consideration.

8. Before discussing whether a delinquency could be attributed to the appellants or not as considered by the learned Trial Court, it is imperative to identify the nature and scope of subject matter agreement to sell for verification whether the same in its scope was even bilateral or not. Under the law, bilateral agreement is a document, by which parties create legal and enforceable obligations to be performed with mutual understanding involving each of them promise to implement an action in exchange for other party's action and parties promise each other that they will perform or refrain from performing an act and if one of the parties perform its part of agreement, it is the other party who has to perform its part as agreed between them. Reliance in this regard is placed upon "*IJAZ AHMAD*

CHAUDHRY Versus Learned CIVIL JUDGE and others" (**2020 CLC 291**).

9. The perusal of agreement to sell reflects that vendors and vendees agreed to sell and purchase subject matter property for total sale consideration of Rs.200,078,000/-, out of which the vendees paid an earnest money in the sum of Rs.8,000,000/-, whereas the balance sale consideration in the sum of Rs.192,078,000/- was liable to be paid till 31.05.2017 and in case of failure of vendees the earnest money was liable to be confiscated. Whereas under the agreement, failure of the vendors entitled the vendees to institute a suit and get the sale deed executed through court of law. With respect to boundary wall which the appellants contended in their suit as part to be performed as a component of bilateral agreement by granting permission to construct a wall, the agreement reads as under:-

> لیکن فریقین اول نے پلاٹ مذکورہ پر بونڈری وال کی فریقین دوئم کو اجازت دی ہوئی ہے۔ جو کہ فریقین دوئم اپنے خرچے پر تعمیر کروائیں گے۔ یہ کہ بوقت رجسٹری سے قبل بونڈری وال کے اندر فریقین اول ودوئم موقعہ پر پیمائش کریں گے۔ اور جتنا بھی رقبہ بنے گا فی مرلہ -/2,03,125روپے کے حساب سے فریقین دوئم فریقین اول کو رقم ادا کرنے کا پابند ہو گا۔
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> [**emphasis supplied**]

The plain reading of clause reflects that what appellants pleaded in their suit that agreement was bilateral in its nature as vendors had to grant permission to the vendees to construct a wall is belied by the terms and conditions of the agreement to sell, which clearly reflects that vendors had actually already granted a permission to the vendees to construct a wall and pay balance sale consideration till the cut-off date at agreed price of Rs.2,03,125/- *per marla*. Therefore, by any

stretch of legal imagination this agreement cannot be constituted as bilateral in its nature and scope. It appears such a plea was crafted just to devise a justification to avoid deposit of balance sale consideration. Therefore, we are clear that there is a fallacy in the plea of the Appellants that agreement to sell was bilateral in its effect and scope as it represent a misconceived and unsound argument.

10. Since the comparison of contents of plaint and agreement to sell fails to rationalize the plea of bilateral agreement which on the face of it is belied by the contents, therefore, it forthwith becomes essential to identify whether the contention or pleadings of the appellants with respect to their readiness and willingness is substantiated through some reliable and creditworthy material. The appellants in Paragraph 3 of the plaint pleaded as under:-

> یہ کہ بقول مدعا علیہم اس دوران ایک مشترکہ کھیوٹ دار نے بر خلاف مدعا علیہم بابت جائیداد مدعویہ خفیہ طور پر دعویٰ جات دائر کر دیئے جبکہ مدعا علیہم نے بھی بر خلاف متذکرہ فریق و دیگر حکم امتناعی حاصل کر رکھا ہے۔ مدعیان کے رابطہ کرنے پر مدعا علیہم نے مدعیان کو یقین دلایا کہ وہ بہت جلد اپنے مقدمات کے معاملات طے کر کے مدعیان کو جائیداد متدعویہ کا بیع / انتقال کروادیں گے۔ جس پر مدعیان نے بقیہ زر ثمن کی بابت بمطابق اقرار مدعا علیہم معاملات جائیداد طے کر لینے اور حکم امتناعی واپس کرانے کی یقین دہانی پر مدعیان نے ماہ دسمبر 2017 بینک ڈرافٹ بنام مدعا علیہم و نقدی تیار کر کے مدعا علیہم سے جائیداد متدعویہ منتقل کرنے کو کہا مگر مدعا علیہم لیت و لعل سے کام لیتے رہے ہیں جبکہ بابت جائیداد زیر معاہدہ معاملات تاحال زیر سماعت عدالت چلے آتے ہیں۔

[**emphasis supplied**]

11. To *prima facie* substantiate the contents of aforesaid paragraph, the Appellants claimed that they attached a copy of pay order with the suit which finds mentioned in the list of reliance submitted under Order XIII Rule 1 CPC. The perusal of pay order reflects that it is in the name of one of the vendors but much less than the balance sale consideration i.e. in the sum of Rs.44,000,000/-. There is no other document showing the payment of balance sale consideration. This Court through order dated 30.11.2022 had directed the appellants in the following terms:-

> *"It reflects from perusal of record that appellants in paragraph 3 of the plaint of the suit alleged that they prepared a bank draft in the name of respondents and approached them on cut-off date, however, respondents did not perform their part of the agreement, but no such document is available on record. Appellants also mentioned in said paragraph regarding some litigation of respondents with third party, as another cause of non-performance on the part of respondents, however, no documentary proof regarding such litigation, particularly its dates of institution and disposal are visible from record. Record shows that crucial date for final execution of agreement to sell was mentioned as 31.05.2017, however, suit was instituted on 23.10.2018 but no plausible cause is discernible from contents of plaint regarding filing of suit after a wait of 17-months from the date of alleged default on part of respondents."*

12. In compliance of said direction, the appellants filed an application bearing C.M.No.3471 of 2022 annexing all the documents directed by us including cross cheque dated 31.10.2017 amounting to Rs.600,000/- in the name of one of the vendors along with pay order mentioned above, which was already annexed with the suit. Additionally, the Appellants annexed statement of account of one of the Appellants, namely, Faisal Mahmood which from 1st July,

2017 to 7th June, 2018 does not reflect that in the whole tenure the appellants had even the amount of balance sale consideration in their account and sole entry of the highest amount in the statement of account is in the sum of Rs.35,526,017/- which is much less than the amount of balance sale consideration. All these factors magnify that the appellants could not justify their plea of readiness and willingness before the learned Trial Court and even before us despite grant of opportunity they failed to substantiate their plea. All these facts convince us to conceive why the learned Trial Court would have directed the appellants to demonstrate their *bona fide* by deposit of balance sale consideration.

13. There appears to be a merit in the stance of the respondents that the appellants through suit were only covering up their default to make the balance sale consideration on the cut-off date and were actually aiming to misuse the process of law. Obviously by paying an abysmal 4.9% of total sale consideration the equity cannot be expected to equip the Appellants to put the subject matter property under a clog through motivated litigation as in a suit for specific performance of agreement to sell the plaintiff, under the mandate of equity is bound to demonstrate that he/she had performed his/her obligation under the agreement or that he/she was prevented to do so by the vendor.

14. The onus at very initial stage from the institution of suit is on the vendee to satisfy the test of equity, *firstly*, that vendor actually refused to accept the sale consideration, *secondly*, the vendee who is seeking performance of agreement to sell having an ability

was ready and willing at all material times to perform his/her part of agreement. In such circumstances, it is essential and imperative that vendee is bound to deposit the balance sale consideration in the Court. The test of law is even on higher pedestrian i.e. the vendee cannot even seek enforcement of reciprocal obligation of the vendor unless he is able to demonstrate not only his/her willingness but also his/her capability to fulfill his/her obligation under the contract. Reliance in this regard is placed upon "*MUHAMMAD YOUSAF versus ALLAH DITTA and others*" (**2021 SCMR 1241**) and "*Mst. NOOR JEHAN and another versus SALEEM SHAHADAT*" (**2022 SCMR 918**). In a recent case titled "*Messrs DW PAKISTAN (PRIVATE) LIMITED LAHORE versus Begum ANISA FAZL-I-MAHMOOD and others*" (**2023 SCMR 555**) the Hon'ble Supreme Court has held as under:-

> *"It is a well-settled exposition of law that the relief of specific performance of a contract is discretionary, however the said discretion cannot be exercised arbitrarily or unreasonably but can be invoked to promote fairness and equity. The person seeking specific performance has to put on show that he is geared up and fervent to perform his part of the contract, but the other side is circumventing or evading the execution of his obligations arising out of the contract. While deciding the suit for specific performance of a contract, the Court has to consider and come to a decision regarding whether the plaintiff is ready and willing to perform his part of the contract, which is in fact substantiated by dint of the conduct or demeanor of the plaintiff before and after instituting the lawsuit. The equitable remedy rests on the discretion which is obviously exercised according to the well-established standards and philosophy of law and not whimsically or capriciously. The fundamental insightfulness of the Courts in directing the plaintiff in a suit for specific performance to deposit the sale consideration in Court in fact articulates that the vendee has the capacity to pay the sale consideration or balance sale consideration and is ready and willing to perform*

> *his obligations arising from the contract. An incessant readiness and willingness is a condition precedent for claiming relief of specific performance, which in unison also conveys the state of mind of the vendee, his capability to pay, keenness and commitment."*

15. In a suit for specific performance of agreement to sell, it is always of paramount consideration that the plaintiff seeking equitable remedy of specific performance must be always willing and ready to perform his part of contract and conduct must satisfy the court that he is entitled to seek relief. These tests are to be satisfied through his ability and readiness and willingness. The wisdom behind directing the vendee to deposit the balance sale consideration is not aimed to verify the vendee's seriousness but it also safeguards the rights of the vendor as such a direction is cautioned to strike a balance between two contracting parties. Reliance in this regard is placed upon "*KHAIRAT ALI versus SAQIB ASHFAQ and others*" (**2023 CLC 926**). The Supreme Court of Pakistan in judgment of *DW Pakistan (Pvt.) Ltd. supra* has held that readiness means the capacity of the Plaintiff to perform the contract, which would include the financial position to pay the purchase price. Willingness refers to the intention of the Plaintiff as a purchaser to perform his part of the contract. Willingness is inferred by scrutinizing the conduct of the Plaintiff/purchaser, including attending circumstances. Continuous readiness and willingness on the part of the Plaintiff/purchaser from the date the balance sale consideration was payable in terms of the agreement to sell, till the decision of the suit, is a condition precedent for grant of relief of specific performance.

16. It must be borne in mind that under Section 22 of the Specific Relief Act, 1877 the jurisdiction to issue a decree of specific performance is absolutely discretionary in its nature. Therefore, the Court in any event is not always bound to grant such relief merely because it is lawful to do so. Reliance in this regard is placed upon "*Mrs. MUSSARAT SHAUKAT ALI v. Mrs. SAFIA KHATOON and others*" (**1994 SCMR 2189**) and "*SIRBALAND v. ALLAH LOKE and others*" (**1996 SCMR 575**).

17. In our analysis all these facts were analyzed by the learned Trial Court which convinced it to direct the Appellants to deposit the balance sale consideration. In legal understanding by filing an application to substitute the deposit of balance sale consideration with surety bond proved to be self-destructive as the appellants got themselves hit by their own stroke under the law as well as equity. In terms of law the delinquency of the appellants by (i) falsely deposing that at all material times they are ready and willing to perform their obligation under agreement to sell; (ii) by failing to *prima facie* establish their ability; (iii) by failing to attach proof of an instrument with respect to balance sale consideration the appellants disentitled themselves to a discretionary relief. The learned Trial Court was constrained to pass a direction for depositing the balance sale consideration and despite there being a caution for dismissal of suit on account of failure of the Appellants, learned Trial Court had no other option but to invoke the provisions of Order XVII Rule 3 CPC and pass the Impugned Order and Decree.

18. So far as contention of the appellants that learned Trial Court proceeded with undue haste and their reliance upon "*MUHAMMAD ASIF AWAN versus DAWOOD KHAN and others*" (**2021 SCMR 1270**) is concerned, suffice is to observe that both contentions are meritless. In *Muhammad Asif Awan's Case* (supra), the matter was fixed for evidence of the other side when Court invoked the provisions of Order XVII Rule 3 CPC and Hon'ble Supreme Court held that progress of the suit was not forestalled by failure of one of the parties through non-deposit of balance sale consideration. Additionally, the Hon'ble Supreme Court laid down a condition precedent for passing any such order that party must have been cautioned with a consequence leading to dismissal of the suit. In failure thereof, it was held that though application for interim relief could be declined but suit could not be dismissed.

19. The facts of said case are not applicable in the instant case wherein learned Trial Court was simultaneously directing the respondents/defendants to file written statement and appellants to deposit balance sale consideration and had also specifically cautioned them that failure of a direction would lead to dismissal of suit. Even otherwise, in the instant case the application of appellants to substitute direction for deposit of balance sale consideration with surety bond proved to be lethal. The direction to the Appellants to deposit balance sale consideration was rather in consonance with the law laid down by the Hon'ble Supreme Court of Pakistan as well as by this Court in judgments reported as "*MUHAMMAD ASIF AWAN versus DAWOOD KHAN and others*" (**2021 SCMR 1270**) and

"*IRFAN RASHEED versus MUHAMMAD MUAZIM and others*" (**PLD 2022 Lahore 372**).

20. Despite hectic efforts of learned counsel for the appellants we are not convinced that the Impugned Order and Decree suffer from any jurisdictional defect or procedural impropriety or is tainted with any illegality, therefore, the same do not warrant any interference. Consequently, this appeal is **dismissed**.

(AHMAD NADEEM ARSHAD) JUDGE

(MUHAMMAD RAZA QURESHI) JUDGE

Approved for Reporting

JUDGE

JUDGE

Qurban*