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JUDGMENT SHEET

LAHORE HIGH COURT

MULTAN BENCH MULTAN

JUDICIAL DEPARTMENT

Civil Revision No.323/2022

Sheikh Khalid Javaid **Versus** Shamas ud Din Chishti

J U D G M E N T

Date of Hearing:	28.02.2024
Petitioner by:	Malik Muhammad Akbar Bhutta, Advocate along with the petitioner.
Respondent by:	Mr. Muhammad Mehrban Ranjha, Advocate along with the respondent.
Applicant in C.M. No.2833/2022 by:	Dr. Ashraf Ali Qureshi, Advocate.

Anwaar Hussain, J. This civil revision is directed against the judgment and decree dated 03.03.2022 whereby the appeal of the respondent was accepted, order and decree dated 20.10.2021 passed by the Trial Court was set aside and the suit of the respondent instituted for specific performance of the contract, based on an agreement to sell dated 29.01.2019 (“**the agreement**”), was decreed. An application bearing C.M. No.2833/2022 has been filed by one Daniyal Zarar Khan s/o Zarar Hameed Khan who has purchased the suit property from the petitioner, when the suit of the respondent was dismissed and the appeal was not preferred, however, the limitation period for preferring appeal was yet to expire. Through this judgment, the said application is also being decided.

2. Malik Muhammad Akbar Bhutta, Advocate, learned counsel for the petitioner submits that the findings of the Courts below are at variance and the impugned judgment and decree passed by the Appellate Court is not only arbitrary but also runs counter to the law as to manifestation of

willingness and readiness on the part of the vendee of an agreement to sell. Adds that the respondent is a practicing advocate who has dragged the petitioner in unnecessary litigation after tying down the property of the petitioner through the agreement and obtaining the interim relief as the respondent had no financial means to pay the balance amount of the consideration in terms of the agreement, within the cut-off date, as despite availing number of opportunities, the respondent failed to deposit the balance consideration amount to the tune of Rs.3,500,000/-. Further contends that the Appellate Court below has erred in decreeing the suit of the respondent by misconstruing the *dicta* laid down in cases titled “Muhammad Asif Awan v. Dawood Khan and others” (2021 SCMR 1270) and “Muhammad Jehanzaib Khan v. Muhammad Rafique Khan and two others” [2021 PLC (CS) 1435].

3. Conversely, Mr. Muhammad Mehrban Ranjha, Advocate, learned counsel for the respondent has supported the impugned judgment and decree and contends that the Appellate Court below has rightly placed reliance on Muhammad Asif Awan case *supra* as well as Muhammad Jehanzaib Khan case *supra* as also the admission of the petitioner before the Trial Court that the agreement was lawfully executed and he has no objection if the suit is decreed. Adds that since the agreement has been admitted, therefore, the petitioner has no case. Further avers that the respondent only delayed the deposit of the balance amount because the suit property was part of *Tawakkal* Town, Multan against which proceedings were pending before the National Accountability Bureau (“the NAB”).

4. Dr. Ashraf Ali Qureshi, Advocate, learned counsel for the applicant in C.M. No. 2833/2022 submits that the applicant is a *bona fide* purchaser and has been defrauded by the collusion of the petitioner with the respondent and needs to be protected as he has paid the entire sale consideration to the petitioner and is in possession of the suit property.

5. Arguments heard. Record perused.

6. This case puts forth the following questions to be adjudicated by this Court:

- i. What are the key factors to be kept in sight while determining the willingness and readiness of a plaintiff in a suit for specific performance of the contract?
- ii. Whether in facts and circumstances of the case the Appellate Court below was justified in relying on the admission of execution of the agreement by the petitioner before the Trial Court?
- iii. Whether an offer made by a party (the defendant) before the Trial Court to decree the suit for specific performance of the contract, which was not accepted by the other party (the plaintiff) remains valid at the appellate stage?

7. Before rendering the opinion on the above formulated questions, it is advantageous to encapsulate the admitted factual matrix of the case and resume of the proceedings before the Trial Court.

8. Admittedly, the dispute relates to a plot measuring 15 *marla* bearing *Khewat* No.153, *Khaitooni* No.458 to 465, situated in Mauza Kaianpur inside Hadd Committee Tehsil Multan City, District Multan. It is not denied that in terms of the agreement, the cut-off-date for the payment of balance consideration amount was 30.06.2019. It is admitted feature of the case that till said date, the balance consideration amount was not paid by the respondent. It is also admitted feature of the case that the suit was instituted on 16.06.2020. It has been averred in the plaint that it was the petitioner who avoided transfer of the suit property within time and therefore, the suit was instituted. It is also admitted feature of the case that on the first date of hearing, i.e., 16.06.2020, the respondent was directed to deposit the Court Fee of Rs.15,000/-. On 26.06.2020, the petitioner entered appearance and his counsel submitted power of attorney as also contesting written statement with the averment that it is the

respondent who never tendered balance payment and the same clearly exhibited that the respondent is neither willing nor ready to perform his part of the contract and therefore, the petitioner has forfeited the earnest amount of Rs.1,500,000/-. The Trial Court, *vide* order dated 23.09.2020, fixed the case for arguments on the application for grant of interim injunction and also directed the respondent to deposit the balance consideration amount of Rs.3,500,000/-. On the next date of hearing, i.e., 06.10.2020, instead of complying with the order of the Trial Court, the respondent filed an application under Section 151, read with Sections 148 and 149 of the Code of Civil Procedure, 1908 (“CPC”), *inter alia*, for extension in time to pay the balance consideration amount and to *sine die* adjourn the case on account of the pendency of proceedings before the NAB in respect of Tawakkal Town, Multan. Thereafter, another application was filed, by the respondent, under Order I Rule 10, CPC to implead the Multan Development Authority as necessary party. Application under Section 151 read with Sections 148 and 149, CPC was withdrawn, *vide* order dated 07.09.2021. In the meanwhile, the petitioner approached the NAB authorities concerned and sought clarification that the suit property does not form part of the *Tawakkal* Town, Multan and hence, permission be granted to the revenue officials concerned, to issue *fard bai* in respect of the suit property, which was accordingly issued. The Trial Court also summoned *Halqa Patwari*, namely, Safdar Ali for verification of *fard bai*, who appeared before the Trial Court on 21.12.2020 and recorded his statement, which reads as under:

”برحلف بیان کیا کہ احتساب بیورو ملتان سے ایک چٹھی مورخہ 28 نومبر 2019 موصول ہوئی کہ موضع کائیاں پور توکل ٹاؤن کھیوٹ نمبر 153/49 کھستونی نمبر 458 تا 465، کھیوٹ نمبر 154/150 کھستونی نمبر 466 کھیوٹ نمبر 157/153 کھستونی نمبر 470 تا 479 جزوی رقبہ پر خرید و فروخت کی پابندی عائد کی گئی چٹھی ہذا پیش کرتا ہوں۔ جس کا اندراج روزنامچہ واقعاتی نمبر شمار 521 مورخہ 04.12.2019 کیا گیا مورخہ 23.11.2020 کو درخواست منجانب AC صاحب ملتان موصول ہوئی جس کے ہمراہ حکم بعدالت جناب صفدر اقبال ڈسٹرکٹ اینڈ سیشن جج/احتساب عدالت ملتان ریفرنس نمبر 43-M/2019 سرکار بنام اعتراف الحق موصول ہوا جس میں مسمیان آفتاب احمد، شیخ خالد جاوید اور زاہد نواز غوری کو ان کی حد تک رقبہ فروخت کرنے اور فرد ملکیت جاری کرنے کا حکم صادر کیا گیا جس کا

اندراج روزنامہ کے نمبر شمار 627 مورخہ 23.11.2020 کیا گیا جو کہ میں فیصلہ درخواست پیش کرتا ہوں۔ اسی فیصلہ کی بنیاد پر شیخ خالد جاوید مدعا علیہ کو اس کے رقبہ کی فرد جمع بندی جاری کی گئی۔“

(Emphasis supplied)

After the provision of the *fard bai*, the Trial Court, *vide* order dated 07.09.2021, accepted the application for grant of interim injunction and again directed the respondent to deposit the balance sale consideration of Rs.3,500,000/. Order dated 07.09.2021 reads as under:

“5. Perusal of record indicates that plaintiff/petitioner has filed suit for specific performance of contract on the basis of agreement to sell dated 14.11.2018 that he purchased the suit property fully detailed in head note in consideration of Rs.50,00,000/- out of which Rs.15,00,000/- were paid as earnest money and remaining amount Rs.35,00,000/- was promised to be paid at time of execution of sale deed on 30.06.2019 but possession was not delivered to him; while on the one hand, the defendant has admitted the execution of agreement to sell but he took plea that defendant has failed to pay the remaining consideration amount within time up till 30.06.2019. In this way the agreement has become rescind itself. The non-depositing of remaining sale price within time will be determined at touch stone of evidence. So, in view of above observations as per admission of defendant regarding execution of agreement to sell, prima facie petitioner has good arguable case. It is pertinent to mention here that on 23.09.2020 the plaintiff was directed to deposit the remaining sale price to show his willingness and subsequently on 24.02.2021 the defendant has recorded his conceding statement to decree the suit if plaintiff deposit the remaining sale price but inspite of this, plaintiff failed for compliance of such order. Therefore, in the interest of justice, the petition in hand is hereby accepted and ad-interim already granted on 16.06.2020 is hereby confirmed with subject to deposit of remaining sale price Rs.35,00,000/- keeping in view the case law titled “**Messrs KUWAIT NATIONAL REAL ESTATE COMPANY (PVT.) LTD. and others vs. Messrs EDUCATIONAL EXCELLENCE LTD. and others**” 2020 SCMR 171 (Supreme Court of Pakistan) till 14.09.2021, otherwise, the instant application alongwith suit will be deemed to be dismissed.”

(Emphasis supplied)

The respondent, instead of complying with the direction of the Trial Court, filed application for review of order dated 07.09.2021 on the ground that the petitioner's title *qua* the suit property is in question and the petitioner be directed to seek permission from the Court of competent jurisdiction to sell the suit property. No reference was made in the said application as to whether any Court has restrained the petitioner from selling the suit property. The contention of the respondent was totally misconceived as the NAB itself clarified the position that the suit property is not disputed and *fard bai* was also issued by the revenue official concerned. No security was deposited by the respondent, under the law for, seeking review of order dated 07.09.2021. A final warning was given, to the respondent, by the Trial Court, on 21.09.2021 to deposit the balance consideration amount in the following terms:

”کونسل مدعی کی طرف سے اعجاز کا نجو ایڈووکیٹ بطور *proxi* کونسل پیش ہوئے اور کونسل مدعا علیہم حاضر، بحث درخواست سماعت شد، اور دعویٰ ہذا کو بوجہ عدم سیکورٹی درخواست نظر ثانی کو خارج کرنے کی استدعا کی ہے اور دعویٰ ہذا کو بوجہ عدم ادخال زر ثمن خارج کرنے کی استدعا کی ہے اور حکم مورخہ 07.09.2021 پر عملدرآمد کرنے کی استدعا کی ہے مگر بجائے کونسل یہی بیان ہیں کہ مدعی خود ایک ایڈووکیٹ ہے ذاتی مصروفیت کی وجہ سے حاضر نہ آسکا ہے۔ مہلت دی جاوے مگر کونسل مدعی حاضر نہ آئے ہیں تاہم بغرض انصاف قطعی آخری موقع برائے بحث درخواست نظر ثانی و ادخال بقیہ زر بیع مبلغ 35/ لاکھ روپے بتقرر 25.9.21 پیش ہووے۔ بصورت دیگر درخواست پڑھ کر فیصلہ کر دیا جائے گا اور عدم ادائیگی زر بیع کی صورت میں دعویٰ خارج کر دیا جائیگا۔“

(Emphasis supplied)

In the meanwhile, the respondent filed an application for transfer of the case, which application was also dismissed. Thereafter, the case was fixed for 18.10.2021, when again another warning was given to the respondent in the following terms:

“Today the instant case was fixed for depositing of remaining sale amount but today again the plaintiff has failed to produce any receipt regarding depositing of remaining sale amount. At this stage, order of learned appellate Court has been submitted in which transfer application filed by the plaintiff has been dismissed. Keeping in view the case law titled “Messrs KUWAIT NATIONAL REAL ESTATE COMPANY (PVT) LTD

and others vs Messrs EDUCATIONAL EXCELLENCE LTD and others” 2020 SCMR 171 (Supreme Court of Pakistan), plaintiff is directed to deposit remaining consideration amount i.e. Rs.35,00,000/- till 20.10.2021 as per order dated 14.10.2021, positively.”

(Emphasis supplied)

The respondent remained failed to comply with the above quoted order of the Trial Court to deposit the remaining sale consideration and hence, *vide* order dated 20.10.2021, the respondent’s suit was dismissed. However, in appeal, the findings of the Trial Court were reversed on the ground that the petitioner has consented to the passing of the decree, before the Trial Court, therefore, the respondent is entitled to decree of specific performance of the agreement.

9. Adverting to the first question, it is pertinent to observe that in terms of Section 22 of the Specific Relief Act, 1877 (“**the Act**”), the jurisdiction of the Courts to issue a decree of specific performance is discretionary in nature as it is an equitable relief, thus, the Court is not bound to grant such relief merely because it is lawful to do so let alone that the same is exercised in favour of a plaintiff who has exhibited contumacious conduct by not complying with repeated directions of the Court to pay balance amount of sale consideration. Cases reported as “Mrs. Mussarat Shaukat Ali v. Mrs. Safia Khatoon and others (1994 SCMR 2189)”; Muhammad Abdur Rehman Qureshi v. Sagheer Ahmad (2017 SCMR 1696); and “Mrs. Zakia Hussain and another v. Syed Farooq Hussain (PLD 2020 S.C. 401)” are referred in this regard. Equity mandates that in a suit for specific performance, it is the duty of the Court to find out, which party has not performed and is trying to wriggle out of his contractual obligations. In exercise of such discretion, the Court may consider the conduct of the parties which becomes relevant in granting and/or refusing decree for specific performance being discretionary and based on principles of equity. In cases involving specific performance, the primary part of the contract is the consideration to be paid by the vendee for which he must exhibit his willingness and readiness, at all times. In this regard, he must

unconditionally seek permission of the Court, on the first date of hearing, to deposit the remaining sale consideration. The Supreme Court in case reported as “Hamood Mehmood v. Mst. Shababa Ishaque and others” (2017 SCMR 2022) observed that it is mandatory for a person seeking performance of the contract, under the Act 1877, to seek permission of the Court to deposit the balance sale consideration and any contumacy/omission in this regard would entail dismissal of the suit. While willingness and readiness of a plaintiff in a suit for specific performance of the contract is crucial and relevant, there are certain aspects which may be relevant *viz-a-viz* the conduct of the plaintiff/vendee entitling and/or disentitling him from the decree for specific performance. It is to be kept in sight that the law of limitation prescribes a specific time for institution of suit for specific performance and the same is considered within time even if filed on the last day of the limitation period prescribed under the law. However, the vendee, as part of natural human conduct, is expected to immediately file a suit for specific performance of contract on refusal of the vendor to adhere to his contractual obligations which would exhibit that the vendee is willing and ready to perform his part of the contract in terms of deposit of the balance consideration. Any delay in this regard may indicate his intention that the plaintiff/vendee himself is not ready and willing to perform his part of the contract and the Court may refuse to grant specific performance on account of such conduct. This is so because it also needs to be kept in sight that in a rising market, the vendee makes a profit by the delay after tying down the seller by creating false excuses. In the present case, there is no explanation in the suit as to why the respondent remained mum for a period of almost one year after the cut-off-date and never acted promptly to institute the suit.

10. Having the above legal position in sight and keeping in view the brief resume of the entire proceedings that took place before the Trial Court and analyzed hereinabove, this Court is of the opinion that the respondent entered into the agreement with the petitioner and

thereafter, entangled the latter into litigation and avoided the payment of the balance consideration amount on one pretext or the other, which propels to opine that the respondent was neither willing nor ready to pay the balance amount of consideration and the Appellate Court below was not justified in relying on the admission of execution of the agreement by the petitioner before the Trial Court to decree the suit of the respondent. In fact, when the direction of the Trial Court dated 23.09.2020 was not complied with by the respondent, the Trial Court should have immediately proceeded to dismiss the suit in terms of *dicta* laid down in case titled “M/s Kuwait National Real Estate Company (Pvt) Ltd. and others v. M/s Educational Excellence Limited and others” (2020 SCMR 171) and by not doing so the Trial Court too proceeded with irregularity that added to the agony of the petitioner.

11. The Appellate Court below was not justified in relying on the admission of execution of the agreement by the petitioner before the Trial Court and the offer of the petitioner that he has no objection if the suit is decreed ignoring the fact that said offer was conditional and subject to payment/deposit of balance amount of consideration. Offer of the petitioner recorded in order dated 24.02.2021 reads as under:

”برحلف بیان کیا کہ اگر مدعی بقیہ زر ثمن داخل عدالت کر دے تو مدعی کا دعویٰ ڈگری کیے جانے پر
اعتراض نہ ہے“

The respondent never deposited the balance consideration before the Trial Court. Therefore, offer of the petitioner, quoted hereinabove, and the admission of execution of the agreement does not justify the contumacious conduct of the respondent. The Appellate Court below also erred by not appreciating that in terms of the *dicta* laid down in Hamood Mehmood case *supra*, the respondent himself should have sought permission of the Court to deposit the remaining sale consideration. On the contrary, the respondent failed to comply with the repeated directions of the Trial Court to deposit the same. In fact, the manner in which the respondent put spooks in the wheel of the proceedings before the Trial Court by filing various applications go on

to reflect his non-readiness, if not unwillingness, to perform his part of the contract by payment of the remaining sale consideration. Therefore, the Trial Court rightly passed order dated 20.10.2021. When the appeal was preferred on 25.10.2021, the Appellate Court below directed the respondent to pay the Court Fee and also remaining consideration amount of Rs.3,500,000/- on/or before 06.11.2021 when only Court Fee was deposited and the order of the Appellate Court regarding deposit of balance consideration was not complied with. No extension was solicited by the respondent. An application was filed with the Duty Judge on 17.11.2021 and order was procured to deposit the balance amount of consideration when the petitioner was not even heard. The application was allowed by the Duty Judge while recording findings on the top margin of the application, in the following terms:

“Petition is allowed as per request of the petitioner. The amount may be deposited through Bank challan.”

When the appeal was finally heard, the Appellate Court below while relying upon the cases of Muhammad Asif Awan and Muhammad Jahanzaib Khan supra accepted the appeal of the respondent. It has been noted that the case of Muhammad Asif Awan supra is not attracted in the present matter inasmuch as no warning was given to the vendee of the said case to deposit the balance consideration as opposed to the factual matrix of the present case where repeatedly, the respondent was directed to deposit the balance consideration while stipulating penal consequences but to no avail. It is pertinent to note that the petitioner/defendant having refuted the assertion of the respondent that the suit property was under caution by the NAB and obtained *fard bai* and also extended an offer to the respondent/plaintiff during the trial proceedings, which the respondent/plaintiff by his conduct refused to accept. As a natural corollary, the offer made by the defendant evaporated and dissipated. This Court is of the opinion that in peculiar facts and circumstances of the case, a conditional offer made by a party (the defendant) before the Trial Court to decree the suit for specific

performance of the contract, which was not accepted by the other party (the plaintiff) does not remain valid at the appellate stage. Therefore, it was unjustified to pass the impugned judgment and decree on the basis of an offer which no longer existed, in favour of litigant who has acted in a contumacious manner. Insofar as the case law cited as Muhammad Jahanzaib Khan supra is concerned, the same is distinguishable and not applicable to the present case as in the said case, the Court held that direction of deposit of remaining sale consideration was not justifiable on the ground that the execution of the agreement to sell, in the said case, was specifically denied which is not the situation in the present case where not only the execution is admitted but the petitioner also offered his willingness to sell if the respondent had made payment of remaining sale consideration, which the latter failed to meet.

12. The matter can be examined from another angle. The same relates to the stubbornness on the part of the respondent to purchase the suit property even though, as per his stance, the same was under encumbrance by NAB authorities, which stance though was belied after the clearance was given by the NAB authorities and *fard bai* was issued by the *Halqa Patwari*. This perplexes a reasonable mind as to why the respondent was bent upon purchasing a property which, if his stance was correct, was prohibited to be transacted, by the NAB as this was the only concern shown by the respondent for non-adherence to his part of the contractual obligations as also the repeated directions of the Trial Court to deposit the balance consideration. The clearance by NAB authorities coupled with the offer by the petitioner (vendor) should have prompted the respondent to grab the opportunity but he protracted the payment before the Trial Court on one pretext or the other. Even when the Appellate Court below admitted the appeal of the respondent for hearing and directed him to pay the balance consideration, the said direction was not complied within stipulated period of time and the deposit was only made in a clandestine manner while filing an application before the Duty Judge who merely allowed the same

without examining the record and hearing the petitioner. Even at the time of filing the appeal, the respondent could have exhibited that he is willing and ready to pay the balance consideration but he did not do so and the Appellate Court below itself had to direct the respondent to deposit remaining consideration by 06.11.2021, which was not adhered to by the respondent that further reflects on contumacious conduct of the respondent *qua* claim of equitable relief. On a pointed question, put thrice by this Court, to the respondent as to whether he can show a single document to exhibit his financial position to pay the balance amount on the cut-off date, the date of institution of suit or such other dates of hearing when the Trial Court gave multiple warnings, he was completely speechless for a while and stated that he sold his house to pay the balance amount before the Appellate Court below. This fact in itself indicates that the respondent after tying down the property of the petitioner under the agreement, had no capacity to pay the balance consideration, instituted the suit after about one year from the elapse of the cut-off date under the agreement and despite repeated directions by the Trial Court never deposited the balance amount that exhibits unjust and unfair approach of the petitioner towards discharge of his contractual obligations and hence, disentitles him from grant of equitable relief of specific performance. Suffice to observe that the performance of the contract is not to be seen from the date when it is suitable to the plaintiff. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the Court must take into consideration the conduct of the plaintiff prior as well as subsequent to the institution of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the cut-off date set for completion of the contract till date of the decree, the plaintiff must prove that he is ready and has always been willing to perform his part of the contract.

13. In view of the preceding discussion, this Court is of the view that the conduct of the respondent has been far from fair and he has failed to make out a case for the grant of any equitable relief since his conduct amply shows that he was not ready and willing to perform his part of the contract: neither (i) when the suit was instituted; (ii) nor when the interim injunction was granted; nor (iii) throughout the proceedings before the Trial Court and only deposited the amount, at the appellate stage, when it suited him, which aspect has escaped the notice of the Appellate Court, hence, the impugned judgment and decree dated 03.03.2022 passed by the Appellate Court below is set aside and the order of the Trial Court dated 20.10.2021 dismissing the suit of the respondent is upheld.

14. It is well evident that the respondent has acted contumaciously, however, this Court is to keep in sight that the petitioner sold the suit property to the applicant of C.M. No.2833/2022 for Rs.6,600,000/-, i.e., Rs.1,600,000/- in excess of the amount agreed to be paid by the respondent under the agreement. In the circumstances, forfeiting the earnest money would be a harsh decision, therefore, the amount of earnest money, which the petitioner received, is to be returned to the respondent within a period of two months from today. In view of the fact that the revision petition has been accepted and the impugned judgment in favour of the respondent has been set aside, C.M. No.2833/2022 has become infructuous.

15. **Allowed** in the above terms.

(ANWAAR HUSSAIN)
JUDGE

Approved for reporting.

Judge