

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

R.F.A. No.168 of 2019

Aqeel Feroz

Versus

Shahid Jamil Sethie

Appellant by: Ch. Ejaz Hussain Warriach and
Mr. Shahzad Siddique Alvi, Advocates,
Respondent by: Mr. Muzammal Din Ch. Advocate,
Date of Hearing: 12.05.2020.

FIAZ AHMAD ANJUM JANDRAN, J.- Through this judgment we propose to decide the instant Regular First Appeal which emanates from the judgment & decree dated 31.05.2019, passed by the learned Senior Civil Judge-II, Islamabad-East, whereby suit for specific performance, permanent and mandatory injunction filed by the appellant was dismissed.

2. The facts, relevant for the disposal of the instant appeal, are that the appellant and respondent No.1 entered into an agreement to sell (hereinafter to be described as “the sale agreement”) on 02.04.2005 regarding land approximately 300 Kanal (hereinafter to be referred as “the subject land”) at the rate of Rs.84000/- per Kanal. The appellant was the purchaser while the respondent No.1 was the seller. An amount of Rs.5-Million was paid by the appellant as earnest money while the remaining amount of Rs.20-Million was to be paid within a period of four months with grace period of one month at the time of transfer of the subject land in favour of the appellant or his nominee. On 12.09.2005, the respondent No.1 issued a legal notice to the appellant by mentioning therein, that the time for payment of remaining sale consideration of Rs.20-Million had elapsed and the appellant had not paid the remaining sale consideration while the respondent No.1 was ready to transfer the

subject land in favour of the appellant. However, vide said notice, the appellant was afforded ten days' time for fulfillment of his obligation otherwise it was mentioned that the sale agreement would stand cancelled and the earnest money paid by the appellant would be forfeited as per terms of the sale agreement.

3. On 18.01.2006, the appellant responded to the said legal notice, through counsel, in terms that according to the sale agreement, physical possession of the subject land has not been handed over so far, therefore, he had not paid the remaining sale consideration, and that he is ready to make the payment of balance sale consideration provided physical possession of the subject land is delivered to him.

4. Thereafter, on 24.04.2007, the appellant issued a legal notice to the respondent No.1 wherein it was stated that along with the said Rs.5-Million, a house of Rs.4-Million had also been transferred in the name of respondent No.1 as earnest money while the respondent No.1 had to handover the physical possession of the subject land as per the sale agreement. It was further mentioned that despite personal and telephonic reminders, respondent No.1 had failed to execute sale deed in favour of the appellant and a huge investment of the appellant is stuck due to noncompliance of the terms of the sale agreement by the respondent No.1. In addition, one month's time was granted for execution of the sale deed. Thereafter, on 22.11.2007, the appellant filed a suit for specific performance and permanent injunction regarding enforcement of the sale agreement.

5. The said suit remained pending before this Court and subsequently stood transferred to the civil court due to the enhancement of pecuniary jurisdiction of the civil courts. It was 14.05.2019, when the learned Trial Court

while relying upon the judgment of the Hon'ble Apex Court in case of "Hamood Mehmood Vs Mst.Shabana Ishaque" (2017 SCMR 2022) directed the appellant to deposit the remaining sale consideration of Rs.25199910/- by the next date i.e. 31.05.2019. On the said date, the appellant failed to deposit the remaining sale consideration and the Court, while relying upon the referred case law, dismissed the suit of the appellant vide judgment and decree dated 31.05.2019, being impugned through the instant Regular First Appeal.

6. Learned counsel for the appellant sought acceptance of the instant appeal on the ground that noncompliance of the order dated 14.05.2019 was due to the reason that the appellant was in a foreign country and could not arrange the said amount; that the appellant was required to pay the balance sale consideration at the time of transfer of the subject land and handing over of physical possession by respondent No.1 after construction of a 40 feet wide path with 20 feet wide carpeted road as per the sale agreement but the respondent No.1 failed to make such constructions and that if the court allows, still he is ready to fulfill his part of obligation under the sale agreement.

7. On the other hand, learned counsel for the respondent No.1 stood forcefully behind the impugned judgment and decree, while relying upon the case law relied upon by the learned Trial Court. Further submitted that from the very first day, the appellant was not ready to fulfill his commitment while at present it would not be possible for the respondent No.1 to transfer the subject land the value whereof has increased manifold as the sale agreement was executed in 2005; that due to its non-fulfillment by the appellant it would be unfair to deliver the subject land at the price of 2005 in 2020; that respondent

No.1 issued a legal notice to fulfill his part of the sale agreement and it was incumbent upon the appellant to show his bonafide intention which he failed; lastly argued that although as per the sale agreement the earnest money is liable to be forfeited yet taking a fair stance the respondent No.1 is ready to return the same in installments subject to provision of reasonable time.

8. We have heard the learned counsel for the parties and examined the record with their able assistance.

9. Through the instant R.F.A., the appellant prays for a decree of specific performance in a suit filed in November 2007 regarding the sale agreement.

It is very much relevant to explain that what is the concept of specific performance under the Specific Relief Act? Originally, prior to the law of specific performance, the remedy for breach of a contract/agreement was a suit for damages and said remedy has not been extinguished yet, being an original and first remedy, while the relief/remedy of specific performance in case of breach of an agreement is additional/alternative. This additional/alternate remedy is provided by way of golden concept of equity. This connotes that roots of remedy contained in specific performance are embedded in concept of equity and the principle of specific performance is invoked through the equitable system. As such all specifications of equitable system on the subject are applicable. Now as eminent jurist Sir William Blackstone puts it “spirit and soul of all laws vest in equity”. Equity is used in the way, that means morality, natural justice, honesty, fairness and uprightness. Basically, the equity fulfills the spirit of law by addendum to it. Now, when it has become crystal clear fact that principles of equity governing the subject are attracted/applicable with full force to settle the case at hand then it is to be seen as to whether it would be fair

and just to pass a decree in favour of a person who entered into the sale agreement regarding the subject land in February 2005 against total sale consideration of Rs.25-Million and just paid Rs.5-Million in February 2005 and then as late as in May 2019, he was directed by the court to deposit in court balance sale consideration of Rs.2,51,99,910/-, but even said order had not been complied with. Whether such direction on the part of court, keeping in view the above stated equitable principle, was against the morality or principles of natural justice, good conscience and honesty? Answer is in negative.

It could be possible that a land worth of which in 2005 was Rs.84,000/- per kanal could be of much folds higher in 2019 but no better option could have come the appellant's way then to immediately deposit the balance sale consideration and have the subject land in 2019 on a price of 2005, but given the omissions to do so it could be safely construed that no one else but the appellant himself alone is author of his misfortune. This conduct is surely against the pillar of equitable system "that he who seeks equity must come with clean hands". The maxim elaborates that conduct of the suitor must be above board in respect of transaction sued for. The conduct of the plaintiff/appellant is a model for deciding the fate of a case as per the spirit of above stated maxim. It is unfair that a defendant/ respondent keeps the subject land pending from 2005 to 2019 but the plaintiff even in 2019 fails to deposit the sale consideration in the court. This Court, therefore, holds that the said conduct is neither fair nor equitable and to exercise discretion in favour of the appellant will be unfair and inequitable. In this respect, beneficial guidance is sought from case of "Sheikh Akhtar Aziz Vs Mst.Shabnum Begum" (2019 SCMR 524).

10. Needless to mention that in a suit for specific performance, till now, the law has been settled that when the time fixed in the sale agreement approaches, the plaintiff/appellant should be ready and show his *bonafide* by depositing total sale consideration in the Court to demonstrate his readiness for performance of the sale agreement. Record further reveals that it was first time on 24.04.2007 when the appellant issued legal notice at his own for performance of the sale agreement, that too, with certain conditions in respect of which he was required to issue said legal notice in August 2005 but he first time intimated his intention that too, with some excuses in April 2007 after about two years of the date of his obligation. The respondent No.1 vigilantly issued the legal notice in September, 2005 i.e. the same year in which the sale agreement was executed. Wherein, he demanded performance of the agreement but it was the appellant who put forth conditions in his belated response dated 18.01.2006 and in further belated legal notice dated 24.04.2007, thus, the inference is drawn against the appellant that he was not willing all along to deposit the sale consideration. The Hon'ble Apex Court has repeatedly held that for a suit in respect of specific performance of agreement to sell, the plaintiff has to show his *bonafide* by depositing full sale consideration in the Court and if he fails in showing said *bonafide*, his suit is liable to be dismissed straightforward. Helpful guidance is taken from case laws reported as "Kuwait National Real Estate Company Pvt. Ltd. Vs Educational Excellence Ltd." (2020 SCMR 171), "Hamood Mehmood Vs Mst.Shabana Ishaque" (2017 SCMR 2022) "Muhammad Wahid Vs Nasrullah" (2016 SCMR 179) and "Adil Tiwana Vs Shoukat Ullah Khan Bangash" (2015 SCMR 828).

11. In the light of above, this Court has arrived at the conclusion that the conduct of the appellant when

adjudged on the touchstone of equitable principles applicable on the subject, most certainly disentitles him for the equitable relief of specific performance, therefore, the findings of the learned trial Court do not require interference and are accordingly upheld.

Even otherwise, ample discretion lies with the court to deny the relief to a purchaser of an immovable property keeping in view the circumstances of each case as he cannot claim specific performance of a contract as a matter of right even where it is lawful to do so. In this regard, reliance can be placed upon the judgments of the Hon'ble Apex Court in case of "Hafiz Muhammad Iqbal Vs Gul-e-Nasreen (2019 SCMR 1880)", Muhammad Abdul Rehman Qureshi Vs Sagheer Ahmad (2017 SCMR 1669), Farzend Ali Vs Khuda Bakhsh (PLD 2015 SC 187), Adil Tiwana Vs Shaukat Ullah Khan Bangash (2015 SCMR 728), Ghulam Nabi Vs Muhammad Yaqoob (PLD 1983 SC 344) and Sirbuland Vs Allah Lok (1996 SCMR 575).

12. Now coming to the second phase of decision of instant appeal which is in respect of Rs.5-Million paid as earnest money by the appellant in February 2005 and acknowledged by the respondent No.1. The said amount remained in use of the respondent No.1 for around 1½ decade approximately. Obviously the value of the Rupee depreciated after 2005 and above all if the subject land was purchased in the year 2005, then in 2020 i.e. today whether it could be of the same value, surely not, same would be much folded higher. The principles of equitable administration of justice system are equally applicable upon all, wherein appellant was bound and expected to adhere to said principles, no doubt in the opinion of the Court, are fully applicable upon the respondent No.1 too because "he who seeks equity must do equity". When the respondent No.1 seeks equitable treatment in his favour

against the appellant, then at the same time, he himself is required to extend/offer equitable treatment against him and in favour of the appellant. If this Court remains silent on the return of said earnest money without any interest or markup, same will be unfair and unjust on the touchstone of equitable principles, therefore, the respondent No.1 is directed to return the earnest money of Rs.5-Million along with interest/markup at the bank rate calculated from February 2005 till the date of payment in two equal installments within a period of six months from the date of this judgment. As the wisdom envisaged from the Hon'ble Apex Court in the case laws reported as Sheikh Akhtar Aziz Vs Mst. Shabnam Begum and others (2019 SCMR 524), wherein it was held that:-

“Finally, there is no cavil with the proposition that relief of specific performance is discretionary in nature and despite proof of an agreement to sell, exercise of discretion can be withheld if the Court considers that grant of such relief would be unfair or inequitable. In the facts and circumstances narrated hereinabove, we are in no manner of doubt that the High Court was quite justified in refusing to exercise discretion in favour of the appellant. However, at the same time, the High Court was careful and circumspect in ensuring that the interest of the appellant was also adequately safeguarded in so far as it directed that the sum of Rs.50,000/- which had admittedly been paid to and received by Respondent No.8 be returned to the appellant along with mark up at the bank rate calculated from the date when it was paid till it was fully recovered. We find that the order of the High Court is well reasoned, supported by the record as well as the principles of law as pronounced by this Court. It merits no interference.”[Emphasis supplied]

In another case titled Shaukat Ullah Khan Bangash Vs Adil Tiwana and others (2018 SCMR 769), Hon'ble Apex Court graciously held that:-

“However, the amount of Rs.35,00,000/- the respondent enjoyed and utilized for almost two decades cannot go unrequited. Nor can be the amount of Rs.1,65,00,000/- which remained deposited with the Court pursuant to the judgment allowing appeal of the petitioner. If grains of equity could be poured in one scale of justice while declining specific performance of contract to the

petitioner, they could also be poured in other scale of justice to compensate the petitioner whose huge sum remained with the respondent for almost two decades and five times more of it remained deposited in the High Court for more than a year pursuant to the judgment of the High Court. It would thus be unjust to leave the petitioner high and dry while declining specific performance of contract. Petitioner, in no case, be denied the bare minimum which he would have been given in the form of interest, had he deposited this much sum in the bank. Similarly he has to be compensated for what he deposited in the Court of Senior Civil Judge pursuant to the judgment dated 4.4.2013 of the Lahore High Court. The rough calculation inevitably sticks to a figure of Rs. 50,000,000 'lacs'. We, thus hold that the petitioner would be entitled to an amount of Rs.50,00,000/- over and above the amount of Rs.35,00,000/- which has already been returned. The amount be deposited in the Court within a period of three months which shall be withdrawn by the petitioner.”

13. The record also shows that in addition to payment of earnest amount of Rs.5-Million, the appellant claimed to have transferred a house worth Rs.4-Million in favour of the respondent No.1. To the extent of that claim, the appellant can avail all remedies available to him under the law.

14. With above modification, the instant appeal is **disposed of** accordingly.

(MIANGUL HASSAN AURANGZEB) (FIAZ AHMAD ANJUM JANDRAN)
JUDGE JUDGE

Imran

Announced in open Court on 08-06-2020.

JUDGE

JUDGE

Approved for reporting.