

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.99/2019
Sardar Naseem Ahmed Sarfraz Khan
Versus
Muhammad Siddique

Date of Hearing: 26.06.2019
Petitioner by: M/s Musqat Nawaz Khan and Hazrat
Younas, Advocates,
Respondent by: Mr. Khurram Mehmood Qureshi, Advocate

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioner, Sardar Naseem Ahmed Sarfraz Khan, impugns the order dated 04.03.2019 only to the extent whereby the Court of the learned Additional District Judge, Islamabad, imposed the condition of the submission of a surety bond for an amount of Rs.10,00,00,000/- while granting leave to appear and defend the suit to him.

2. The facts essential for the disposal of the instant revision petition are that on 06.02.2017, an agreement was executed between the petitioner and M/s Sialko Pak Sports, whereby the former agreed to sell plot No.20, College Road, Sector F-7/2, Islamabad, measuring 1066.67 square yards ("plot No.20") to the latter for a total sale consideration of Rs.15,40,00,000/-, out of which an amount of Rs.5,80,00,000/- had been paid to the petitioner whereas the remaining amount of Rs.9,60,00,000/- was to be paid to the petitioner by 05.03.2018, i.e. at the time of the submission of the transfer application form before C.D.A.

3. The petitioner/seller had handed over cheque No.A-93286184 dated 05.04.2018 for an amount of Rs.10,00,00,000/- to the respondent/purchaser as a guarantee. The said cheque was to be returned to the petitioner/seller on the completion of the agreement. The respondent/purchaser was entitled to present the said cheque for encashment in case of failure on the petitioner/seller's part to fulfill the terms and conditions of the said agreement up to 05.03.2018. All this has explicitly been provided in clauses 7 and 8 of the agreement dated 06.02.2017.

4. The said cheque dated 05.04.2018 issued in the name of Muhammad Siddique, who is said to be the proprietor/partner of M/s Sialko Pak Sports, was dishonoured on presentation on 05.07.2018. The reason for dishonour was stated to be the difference in the amount written in words and figures.

5. On 21.05.2018, the respondent (Muhammad Siddique) instituted a suit for recovery of Rs.10,00,00,000/- against the petitioner before the Court of the learned Additional District Judge, Islamabad. The said suit was filed under Order XXXVII of the Code of Civil Procedure, 1908 ("C.P.C."). On 14.07.2018, the petitioner filed an application for leave to appear and defend the said suit. Vide order dated 04.03.2019, the said application was allowed subject to the submission of surety bond for an amount of Rs.10,00,00,000/-. The condition as to the furnishing a surety bond has been assailed by the petitioner in the instant civil revision petition.

6. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant revision petition, submitted that since the petitioner is ready, willing and able to perform his obligations under the agreement dated 06.02.2017 and transfer plot No.20 to M/s Sialko Pak Sports and/or its nominee, there was no occasion for the respondent to have presented the cheque dated 05.04.2018 for encashment; that the said cheque was issued only as a guarantee and the same could be encashed only if the petitioner failed to transfer plot No.20 to M/s Sialko Pak Sports and/or its nominee; that the respondent has not mentioned in the plaint that the said cheque was given only as a guarantee; that the said cheque was issued without any consideration; that M/s Sialko Pak Sports and/or its nominee has not paid the balance sale consideration of Rs.9,60,00,000/- to the petitioner; that although plot No.20 was mortgaged with Bank Islami Pakistan Ltd. but the said mortgage has already been redeemed and presently, there is no impediment in the transfer of plot No.20; that since the respondent's reply to the petitioner's application for leave to appear and defend was not supported by an affidavit, the said reply could not be taken into consideration; that the learned Trial Court

erred by not appreciating that on 28.03.2018, the petitioner had filed a suit for declaration etc. before the learned Civil Court; that in the said suit, it had been prayed that the respondent be declared as having violated the agreement dated 06.02.2017; that in the said suit, the petitioner had also prayed for a mandatory injunction directing the respondent to return the cheque dated 05.04.2018 to the petitioner; that vide letter dated 04.04.2018, the petitioner had instructed the Manager, Al-Meezan Bank Ltd. not to encash the said cheque due to the pending litigation; that the condition of furnishing of surety bond for an amount of Rs.10,00,00,000/- is most onerous and unreasonable; and that once the learned Trial Court held that there were adequate grounds for granting leave to the petitioner to appear and defend the suit, there was no occasion for the imposition of such a harsh condition. Learned counsel for the petitioner prayed for the revision petition to be allowed and for the condition as to the furnishing of a surety bond for an amount of Rs.10,00,00,000/- to be set-aside. In making his submissions, learned counsel for the petitioner placed reliance on the judgments in the cases of Faridullah Khan Vs. Masood Asghar Mian (2017 CLC 1736), Muhammad Hussain Vs. Malik Allah Yar Khan (2012 CLC 1679), A.B.L. Vs. Khalid Mahmood (2009 CLC 308), Ghulam Rasool Vs. Saadullah Khan (2006 SCMR 306), Javed Qayyum Khan Vs. Muhammad Ismail Sabri (2002 CLC 439), Asif Khurshid Vs. Saeed Ahmad (2000 CLC 913), Mian Rafique Saigol Vs. Bank of Credit and Commerce International (Overseas) Ltd. (PLD 1996 SC 749), Mst. Amina Begum VS. Mehar Ghulam Dastagir (PLD 1978 SC 220) and Fine Textile Mills Ltd. Vs Haji Umar (PLD 1963 SC 163).

7. On the other hand, learned counsel for the respondent submitted that the petitioner was in no position to transfer plot No.20 to the respondent since a charge had been placed on the said plot in favour of M/s Edwin Coe L.L.P.; that plot No.20 was scheduled to be auctioned on 20.07.2019 at 04:00 p.m. pursuant to the orders passed by the Court of Chaudhary Mumtaz Hussain, District Judge, Islamabad in the case titled "*M/s Edwin Coe L.L.P. Vs. Naseem Ahmad Sarfraz Khan*"; that all this is mentioned in the auction notice published in the newspapers; that the petitioner had

concealed the factum as to the said litigation from the respondent and/or M/s Sialko Pak Sports while executing the agreement dated 06.02.2017; the petitioner also concealed this fact from this Court as well as the learned Trial Court; that given the auction notice published in the newspapers, the petitioner cannot claim to be in a position to transfer plot No.20 in favour of the respondent and/or M/s Sialko Pak Sports; that out of Rs.5,80,00,000/- already paid by the respondent, an amount of Rs.3,20,00,000/- was paid by the petitioner to Bank Islami Pakistan Ltd. so that the mortgage on the plot No.20 could be redeemed; that since the respondent has already parted with a huge amount of Rs.5,80,00,000/-, which is unlawfully being retained by the petitioner, the latter cannot claim that the cheque in question was issued without any consideration; that since the petitioner was unable to transfer plot No.20 to the respondent and/or M/s Sialko Pak Sports by 05.03.2018, the respondent was well within his rights to have presented the said cheque for encashment; that the mere fact that the cheque was issued as a guarantee did not mean that it could not be presented for encashment after the petitioner failed to transfer plot No.20 to the respondent and/or M/s Sialko Pak Sports by 05.03.2018; and that while imposing the condition as to the furnishing of surety bond for an amount of Rs.10,00,00,000/-, the learned Trial Court did not exercise its discretion unlawfully or arbitrarily. Learned counsel for the respondent prayed for the revision petition to be dismissed.

8. I have heard the contentions of the learned counsel for the contesting parties, and perused the record with their able assistance. The facts leading to the filing of the instant revision petition have been set out in sufficient detail in paragraphs 2 to 5 above and need not be recapitulated.

9. Vide agreement dated 06.02.2017, the petitioner agreed to transfer plot No.20 to M/s Sialko Pak Sports and/or its nominee by 05.03.2018 upon receipt of the balance sale consideration of Rs.9,60,00,000/-. It is an admitted position that Rs.5,80,00,000/- has already been paid by the respondent, out of the total sale consideration of Rs.15,40,00,000/- for plot No.20. Indeed the cheque dated 05.04.2018 for an amount of Rs.10,00,00,000/- was

given as a guarantee to the respondent. The said cheque was to be returned in original to the petitioner on completion of the agreement. It is also admitted that the said agreement has not been completed in that plot No.20 has not been transferred to M/s Sialko Pak Sports and/or its nominee.

10. Learned counsel for the respondent produced before the Court a copy of the auction notice published in the newspapers. Perusal of this notice shows that plot No.20 was scheduled to be auctioned on 20.07.2019 at 04:00 p.m. pursuant to the orders passed by the Court of Chaudhary Mumtaz Hussain, District Judge, Islamabad in the case titled "*M/s Edwin Coe L.L.P. Vs. Naseem Ahmad Sarfraz Khan*". This shows that there had been a charge placed on the said plot in favour of M/s Edwin Coe L.L.P. Learned counsel for the petitioner did not make any submission as to the correctness of the contents of the said auction notice. This leads me to form a *prima facie* view that when the said agreement with respect to plot No.20 was executed, plot No.20 was already under a charge in favour of M/s Edwin Coe L.L.P.

11. The petitioner has omitted to make reference to the said charge or the litigation between M/s Edwin Coe L.L.P. and the respondent in his application for leave to appear and defend as well as in the instant revision petition. The factum of plot No.20 being under a charge and scheduled to be auctioned pursuant to Court orders adds considerable credence to the contention of the learned counsel for the respondent that the petitioner was in no position to transfer plot No.20 to M/s Sialko Pak Sports and/or its nominee by 05.03.2018. Accordingly, the contention of the learned counsel for the petitioner that the petitioner is ready to transfer plot No.20 to M/s Sialko Pak Sports and/or its nominee upon payment of the remaining sale consideration of Rs.9,60,00,000/-, is not worthy of any consideration.

12. There is no denying the fact that the respondent has already paid a huge amount of Rs.5,80,00,000/- as part consideration for plot No.20. Out of the said amount, Rs.3,20,00,000/- was paid by the respondent to Bank Islami Pakistan Ltd. to redeem the mortgage on plot No.20. Admittedly, the cheque dated 05.04.2018 for an amount

of Rs.10,00,00,000/- was given as a guarantee for the completion of the agreement. Since the said cheque was furnished as a guarantee to ensure that the petitioner performs his part of the bargain under the agreement dated 06.02.2017, it cannot be said that the said cheque was furnished without any consideration. It is well settled that the liability of a surety is co-extensive with that of the principal debtor.

13. Since I do not find any jurisdictional infirmity or arbitrariness in the decision of the learned Trial Court to grant leave to appear and defend the suit subject to the condition of surety bond of Rs.10,00,00,000/-, the instant revision petition is dismissed with no order as to costs. The learned Trial Court while proceeding with and deciding the suit shall be uninfluenced by any observations made in this judgment.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 24/07/2019

(JUDGE)

*Qamar Khan**