

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.600 of 2018
Chaudhry Muhammad Khan and another
Versus
Civil Judge, 1st Class (East) Islamabad and another

Date of Hearing: 22.03.2018
Petitioners by: Chaudhry Adil Mushtaq, Advocate
Respondent No.2 by: Mr. Adil Aziz Qureshi, Advocate.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioners, Chaudhry Muhammad Khan and his wife, Ms. Naheed Khan, impugn the orders dated 02.02.2018, and 07.02.2018, passed by the Court of the learned Civil Judge, Islamabad, whereby extensions in time were granted to respondent No.2/plaintiff for the deposit of the sale consideration after respondent No.2's suit for declaration, specific performance of the agreement, permanent and mandatory injunctions against the petitioners was decreed on 20.12.2017.

2. The facts essential for the disposal of this petition are that vide agreement to sell dated 25.03.2017, the petitioners agreed to sell plot No.14, street No.14, Chak Shahzad Farms, Islamabad, measuring 05 acres to respondent No.2 for an amount of Rs.11,20,00,000/-. An amount of Rs.1,00,00,000/- was paid as an earnest money, whereas the balance amount was to be paid within six months from the date of the said agreement. After disputes and differences arose between the said parties, respondent No.2, on 26.10.2017, filed a suit for declaration, specific performance of agreement to sell dated 25.03.2017, permanent and mandatory injunction against the petitioners before the learned civil Court. Vide order dated 20.12.2017, the learned civil Court directed respondent No.2/plaintiff to deposit the Court fees. Furthermore, it was directed that summons be issued to the petitioners/defendants through registered A.D. for 24.02.2018. For the sake of clarity, the said order dated 20.12.2017 is reproduced herein below:-

20-12-17 کلرک کونسل مدعی حاضر۔
دعویٰ التخیل مختص کا ہے مدعی کو وحدانیت کی جاتی ہے۔ کورٹ فیس داخل کرے۔ مکرر سمن بنام مدعا علیہم
بزرگ رجسٹرڈ AD بتقرر 24-02-18 جاری ہووے۔

3. The said order was passed in the presence of the clerk of the learned counsel for respondent No.2/plaintiff. After the said order was passed, it appears that the learned counsel for the petitioners/defendants tendered appearance before the learned civil Court and submitted his *Wakalatnama*. The learned civil Court also recorded the statement of the learned counsel for the petitioners/defendants that if the remaining sale consideration is paid by respondent No.2/plaintiff in accordance with the terms of the agreement, the petitioners/defendants would be ready to transfer the property, and would have no objection to the suit being decreed. All this happened on 20.12.2017. Again, for the sake of clarity, the said statement is reproduced herein below:-

مکرر
منجانب مدعا علیہ نمبر ۲، وکالت نامہ شیر جان محمد خان Adv داخل شد۔ چوہدری عادل مشتاق Adv داخل شد کونسل مدعا علیہ نمبر ۲ بیان قلمبند کرنا چاہتے ہیں۔ بیان ہے کہ اگر مدعی بزرگ رجسمن برطابق معاہدہ و دعویٰ ادا کر دے تو مدعا علیہم نمبر ۲ جائیداد و ٹرانسفر کرانے کو تیار ہیں اور اس صورت میں دعویٰ بھی ڈگری ہونے پر اعتراض نہ ہے۔
سن کر درست تسلیم کیا۔

4. On the basis of said statement, the learned civil Court, vide order dated 20.12.2017, decreed respondent No.2/plaintiff's suit subject to the payment of the remaining sale consideration within a period of thirty days, failing which the suit would be deemed to have been dismissed. The decree passed by the learned civil Court is in the following terms:-

"1. Keeping in view the statement of learned counsel for defendant No.1 & 2 recorded above, the suit is hereby decreed in favour of plaintiff as prayed for subject to the payment of remaining sale consideration amount within 30 days. In case of failure on part of plaintiff the suit shall be deemed to be dismissed, however, defendant No.3 being record keeper is at liberty to act in accordance with its bylaws, rules and regulations.

2. No order as to costs. Decree sheet be prepared accordingly. File be consigned to record room after its due completion."

5. On 01.02.2018, respondent No.2/plaintiff filed an application praying for an extension in time for the deposit of the remaining

sale consideration. Vide order dated 02.02.2018, the learned civil Court, without issuing notices to the petitioners/defendants, granted further period of ten days to respondent No.2/plaintiff to deposit the remaining sale consideration, failing which the suit was to be dismissed.

6. On 07.02.2018, respondent No.2/plaintiff filed another application praying for an extension in time by one month for the payment of the remaining sale consideration. Vide order dated 07.02.2018, the learned civil Court granted a period of 20 days for the deposit of the remaining sale consideration. This order was also passed in the absence of the learned counsel for the petitioners/defendants. However, it was ordered that “*the other side be intimated*”. The said orders dated 02.02.2018 and 07.02.2018, passed by the learned civil Court, have been impugned by the petitioners in the instant writ petition.

7. Learned counsel for the petitioners, after narrating the facts leading to the filing of the instant writ petition, submitted that after the order and decree dated 20.12.2017 was passed, the learned civil Court had become *functus officio* in the matter, and could not have enlarged the time fixed in the said order and decree for the payment of the remaining sale consideration; that since the said order and decree was passed on the basis of the statement of the learned counsel for the petitioners/defendants, the learned civil Court could not have enlarged the time without hearing the petitioners/defendants; that the said orders dated 02.02.2018 and 07.02.2018 were *corum-non-judice*; that since respondent No.2/plaintiff had not deposited the remaining sale consideration within the time fixed in the said order and decree, the suit stood dismissed on 19.01.2018; and that after the dismissal of the said suit, the learned civil Court could not have altered the decree to the petitioners/defendants’ detriment. In making his submissions, learned counsel for the petitioners placed reliance on the law laid down in the cases titled as Rehman-ud-Din and another Vs. Sahibzada Jehanzeb (2004 SCMR 418), Mirza Zahoor Hussain Vs. Mirza Munawar Hussain and 2 others (2002 YLR 2834) and Ghulam Murtaza and others Vs. Ghulam Jillani and others (2000 YLR

1798). Learned counsel for the petitioners prayed for the writ petition to be allowed, and for the impugned orders to be set-aside.

8. On the other hand, learned counsel for respondent No.2/plaintiff submitted that on 20.12.2017, the learned civil Court had adjourned the matter to 24.02.2018; that respondent No.2/plaintiff was unaware about the statement recorded on 20.12.2017 as well as order and decree dated 20.12.2017; that respondent No.2/plaintiff came to know about the said decree on 31.01.2018 from his rival that the case had been decided in his favour; that respondent No.2/plaintiff prepared pay orders/cheques for the remaining sale consideration, but the learned civil Court required him to deposit the amount in the Court; that consequently, respondent No.2/plaintiff filed another application for an extension in time for the deposit of the remaining sale consideration; that on 01.03.2018, the remaining sale consideration was deposited in the Court; that the instant writ petition was not maintainable; and that the impugned orders should have been challenged by the petitioners in a civil revision petition.

9. I have heard the contentions of the learned counsel for the contesting parties, and have perused the record with their able assistance. The facts leading to the filing of the instant writ petition have been set out in sufficient details in paragraphs 2 to 6 above, and need not be recapitulated.

10. The vital question that needs to be answered is whether after passing the order and decree dated 20.12.2017, the learned civil Court had become *functus officio*, and therefore, could not have enlarged the time fixed in the decree for the deposit of the remaining sale consideration.

11. As a general rule once a Court passes a decree, it becomes *functus officio* and cannot modify the decree. It is only the higher Court which can either set-aside the decree or modify it. Since the Court after passing a decree becomes *functus officio*, it also has no power under Section 148 C.P.C. to extend the time for depositing the money by modifying the terms of the decree. An

exception to this rule is a decree passed by a Court in a suit for specific performance of an agreement. The Court neither loses its jurisdiction after the grant of a decree for specific performance nor becomes *functus officio*. The mere fact that section 35(c) of the Specific Relief Act, 1877, gives power to the Court to pass an order of rescission of the contract would indicate that till the sale deed is executed in execution of the decree, the Court retains its power and jurisdiction to deal with the decree of specific performance. In such a case, the Court has the power to enlarge the time to pay an amount or to perform the conditions mentioned in the decree for specific performance. In other words, the Court has a discretion to extend time for compliance of the conditional decree as mentioned in the decree for specific performance.

12. Section 35(c) of the Specific Relief Act, 1877, reads as follows:-

“35. When rescission may be adjudged. -Any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely:-

(a)...

(b)...

(c). Where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums which the Court has ordered him to pay.”

13. The said provision has been interpreted by the superior Courts such that a decree passed in a suit for specific performance of contract is treated as a preliminary decree; and even after the passing of such a decree, the Court does not become *functus officio*, and retains the power to extend the time within which the decree holder was placed under an obligation to pay the sale consideration. Reference in this regard may be made to the following case law:-

- (i) In the case of Shabbir Ahmed Vs. Zahoor Bibi (PLD 2004 SC 790), the Hon'ble Supreme Court quoted with approval the judgment in the case of Abdul Shaker Vs. Abdul Rahiman (AIR 1923 Madras 284), wherein it was held that a decree for specific performance is in the nature of a preliminary

decree, the original Court keeping control over the action and having full power to make any just and necessary orders therein including, in appropriate cases, the extension of the time, and that the contract is not determined by mere failure of the plaintiff to pay the amount within the stipulated time. The Hon'ble Supreme Court interpreted section 35(c) (*ibid*) as follows:-

“16. Perusal of section 35(c) clearly indicates that even after passing of decree, the Court possesses the power to rescind the contract and' consequently set aside the decree, which it had passed earlier. Irresistible conclusion, therefore, would be that a suit, which was once decreed, could be dismissed again if the case falls within the scope of section 35(c). The main characteristic of section 35 is that the Court has been empowered to rescind or not to rescind the contract, despite the fact that decree has already, been passed. If still the Court permits the decree to remain operative, certainly the time could be extended. Normally in a civil suit after passing of decree, the proceedings come to an end. In a suit for specific performance, the situation is different and if the case falls under clause (c) of section 35, still the order of rescission can be passed: This brings it within the scope of preliminary decree, as further proceedings, as a rule, are to be taken before a suit could be completely disposed of. Besides, such decree itself assumes the characteristics of a contract, whereby certain acts are yet to be performed, including depositing of the purchase price, cost of purchase price of necessary; stamps for execution of conveyance deed, the seller has also to put his appearance for signing conveyance deed, to receive the purchase price, etc.”

(Emphasis added)

- (ii) In the case of Nizam-ud-Din Vs. Ch. Muhammad Saeed (1987 CLC 1682), the Hon'ble Mr. Justice Fazal Karim (as he then was), interpreted section 35 *ibid* in the following terms:-

“6. The word ‘sue’ in section 35 appears, at first sight, to present some difficulty in its application to a case, such as this, in which decree for specific performance has already been passed, but that difficulty at once disappears if we read the word ‘sue’ in its setting, i.e. in the context of the section as a whole, particularly clause (c) and the following words in the last paragraph namely “in the same case, the Court may by order in the suit in which decree has been made and not complied with, rescind the contract either as regards the party in default or altogether as the justice of the case may require”.

7. Thus, read the word ‘sue’ seems to have been used not in the sense of suit as that expression is technically understood, but in its ordinary dictionary meaning namely to institute legal proceedings; to make application to a law

Court, so that the action, when under clauses (a) and (b) may be in the form of a formal suit, and when under clause (c) may be in the form of an application or petition.

8. The significance of section 35 lies in this that the power that it gives is the power to rescind or not to rescind the contract even though a decree has been passed; and it appears to follow as a natural corollary that if the Court, in its discretion, does not order the rescission of the contract, despite there being a default in the payment of money in accordance with the decree, it may, to allow the decree to remain operative, enlarge the time.

9. It seems to me, therefore, that by necessary implication, section 35, clause (c), empowers the Court to enlarge the time specified in the decree.

10. At any rate, there should be no doubt that one clear effect of section 35 is that the Court has not, with the passing of the decree, become functus officio and that is what takes it out of the general rule, stated above.

(Emphasis added)

- (iii) In the case of Nisar Ahmed Vs. Muhammad Yousaf (PLD 1994 Lahore 280), the Hon'ble Lahore High Court, speaking through the Hon'ble Mr. Justice Gul Zarin Kiani (as he then was), had the occasion to hold as follows:-

“Where, therefore, a decree for specific performance of a contract of sale has been passed with a condition that the plaintiff should deposit the purchase amount within a specified time and the plaintiff makes default in payment of the sum which the Court has ordered him to pay, the Court retains the jurisdiction to extend time under section 148 of the Civil Procedure Code, 1908 even though the decree passed contained a default clause providing that in default of the plaintiff to make the requisite payment within the period fixed by the Court, the suit shall stand dismissed. Such power to extend time vests not only in the original Court but can be exercised by the appellate Court as well.”

Furthermore, it was held as follows:-

“The decree which is made in a suit for specific performance is not a final decree of the character that completely debars the Court from extending the period fixed by it, for the decree in such a suit partakes of the nature of a contract and unless it is rescinded or performed it subsists and therefore the right of the Court to make the extension of time for payment also subsists.”

- (iv) In the case of Asraf Ali alias Asrafuddin Mondal Vs. Bayla Hazda (PLD 1967 Dacca 557), it has been held *inter-alia* as follows:-

“It is thus clear that the decree in an action for specific performance of contract, no matter whatever may be the form in which it may be drawn up, is, in the eye of law, a preliminary decree, and as such, even where a default

clause is attached thereto, is not dead but pending, though in a comatose condition. Necessarily the Court retains control over the action and has therefore, jurisdiction to enlarge time regardless of the said default clause.”

- (v) In the case of Mst. Samira Butt Vs. Hasnain Ahmed Nasir (2009 MLD 942), it was held by the Hon'ble Lahore High Court that the trial Court, after passing a decree in a suit for specific performance, had not become *functus officio* and had the jurisdiction to enlarge the time for the deposit of the remaining sale consideration under section 148 C.P.C.
- (iv) In the case of Mirza Zafar Iqbal Baig Vs. Mirza Ayub Baig (2010 YLR 386), the Hon'ble Lahore High Court spurned the argument that the learned trial Court, after passing a decree for specific performance, had become *functus officio* and could not extend the time fixed in the decree for the deposit of the sale consideration. It was held *inter-alia* that where a decree is passed in a suit for specific performance of a contract, and the decree holder fails to make payment of the decreetal amount within the time fixed by the Court, the Court that passes the decree continues to have control over the *lis*, and can extend the time for the payment of the sale consideration/decreetal amount.

14. After taking into consideration the law laid down in the judgments referred to herein above, I cannot bring myself to agree with the contentions of the learned counsel for the petitioners that after passing the order and decree dated 20.12.2017, the learned civil Court had become *functus officio*. Since the said decree was passed in a suit for specific performance, the learned civil Court continued to retain control over the *lis*, and could either pass an order rescinding the agreement between the parties or to enlarge the time fixed for the payment of the remaining sale consideration.

15. Be that as it may, I am of the view that an order to extend the time fixed in a decree for the payment of the remaining sale consideration cannot be passed in routine and ought to be passed in exceptional circumstances and only when the conscience of the Court is satisfied that the default on the applicant's part to deposit

the remaining sale consideration within the time fixed in the decree was for “*sufficient cause*” or for reasons beyond the applicant’s control. An order to grant such an extension in time can certainly be not passed without issuing notice to the other side. In the case at hand, both the impugned orders were passed in the absence of the petitioners. Such orders, in my view, were in stark violation of the principles of natural justice, and had operated to the petitioners’ detriment. This is moreso because the order and decree dated 20.12.2017 was passed on the basis of a statement made on behalf of the petitioners that if the balance sale consideration is paid by respondent No.2 in terms of the agreement, they would have no objection if respondent No.2’s suit for specific performance was decreed.

16. In respondent No.2’s first application for extension of time, it was pleaded *inter-alia* that respondent No.2 had been unaware of the statement made on 20.12.2017 on behalf of the petitioners, as well as the decree passed by the learned civil Court on the basis of the said statement. After the learned civil Court granted an extension for a period of ten days, vide order dated 02.02.2018, respondent No.2 applied once again for an extension in time for a period of thirty days. An essential requirement in a suit for specific performance is that the plaintiff/purchaser must be ready, willing and able to perform his part of the contract by paying the sale consideration. Inability on the part of such a plaintiff/purchaser to pay the remaining sale consideration in accordance with the terms of the agreement to sell or a decree passed by a Court, disentitles him from the grant of the equitable relief of specific performance. Even if a plaintiff during the pendency of a suit for specific performance does not show compliance with an interim order passed by the Court for the deposit of the remaining sale consideration in the Court, the suit is liable to be dismissed due to such a default. Reference in this regard may be made to the following case laws:-

- (i) In the case of Haji Abdul Hameed Khan Vs Ghulam Rabbani (2003 SCMR 953), it was held that where the plaintiff, in a suit for specific performance of an agreement to sell, does not

deposit the balance sale consideration amount within the time fixed by the trial court, the suit was liable to be dismissed. Furthermore, it was held that a plaintiff seeking the equitable remedy of specific performance must always be ready and willing to perform his part of the contract. If the plaintiff does not deposit the balance sale consideration amount within the time stipulated by the trial Court, the presumption would be that the plaintiff was not serious in prosecuting his remedy.

- (ii) In the case of Adil Tiwana and others Vs Shaukat Ullah Khan Bangash (2015 SCMR 828), the plaintiff had failed to pay the balance sale consideration within the period specified in the agreement to sell. Even when the suit for specific performance was filed, the plaintiff did not seek to deposit the balance sale consideration in the Court. The direction of the trial Court to the plaintiff to deposit Defence Saving Certificates, for an amount equal to the balance sale consideration, within a period of one month was also not complied with by the plaintiff. In the ultimate analysis, the plaintiff had failed to comply with the orders/directions of the trial Court despite several opportunities. In such circumstances, the plaintiff's suit for specific performance was held to have been correctly dismissed. In the said judgment, the Hon'ble Supreme Court made the following observations:-

"...We may also add at this stage that the remedy by way of specific performance is equitable and it is not obligatory on the Court to grant such a relief merely because it is lawful to do so. Section 22 of the Specific Relief Act expressly stipulates so. It is axiomatic that one who seeks equity must do equity. In the present case all equities are squarely in favour of the appellants/defendants and stacked high against the respondent/plaintiff."

17. All these aspects should have been taken into consideration by the learned civil Court before allowing respondent No.2's applications for extension in time for the deposit of the remaining sale consideration. It is well settled that presumption of correctness attaches to judicial orders. Furthermore, every litigant is presumed to be aware of the contents of the orders that

are passed by a Court or a Tribunal in a /is to which he is a party. The burden lay on respondent No.2 to satisfy the Court that he was indeed unaware of the statement made on behalf of the petitioners on 20.12.2017 as well as the order and decree dated 20.12.2017. The impugned orders dated 02.02.2018 and 07.02.2018 show that the learned civil Court did not require respondent No.2 to discharge such a burden.

18. Perusal of the impugned orders dated 02.02.2018 and 07.02.2018 show that they are devoid of reasons. In order for the High Court to effectively exercise its powers of judicial review, there must be a reasoned order so as to ascertain the process of thought and reasoning that a Court or a Tribunal came to for its findings. All that is stated in the impugned orders is that the extension is being granted “*in the interests of justice*”. The interests of justice were certainly not served when the said orders were passed without issuing notice to the petitioners. The principle of *audi alteram partem* is not confined to proceedings before Courts, but extends to all proceedings by whomsoever held which may affect the person or property or other right of the parties concerned in the dispute. Violation of this would be enough to vitiate even the most solemn proceedings. This principle is said to have originated from Islamic principles of justice. The corollary of the said principle is that a party to proceedings should be given reasonable notice of the nature of the case to be met. This principle is an inbuilt part of civil contracts and applies to all kinds of proceedings strictly and departure therefrom would render subsequent actions illegal in the eye of law. In the case of Mst. Fatima Vs. Sardara (PLD 1956 Lahore 474), it was held by Kaikaus, J. as follows:-

“That does not mean that even the violation of the elementary principle that no party can be bound by an order passed behind his back could not be a ground for setting aside the order in exercise of powers of revision. This principle is deemed to be embodied in the provisions of the Civil P.C. principles of natural justice do not need to be expressly embodied in procedural enactments. It is implied in all provisions of the Civil P.C. that an order which affects a party is to be passed only after notice to him.”

19. Since the impugned orders dated 02.02.2018 and 07.02.2018 were passed in violation of the requirements of natural justice, I am of the view that the instant writ petition against the said orders is maintainable. Even otherwise, this Court has ample power to convert a writ petition into a civil revision petition and *vice versa* if the interests of justice so demand. Reference in this regard may be made to the law laid down in the cases of Muhammad Ayub Vs. Obaidullah (1999 SCMR 394), and Lal Zaman alias Lalono Zargar Vs. Asfandiyar Khan (PLD 2012 Peshawar 75).

20. As regards the case law relied upon by the learned counsel for the petitioners, the same does not come to his aid. The case of Rehman-ud-Din and another Vs. Sahibzada Jehanzeb (*supra*), is with respect to a suit for pre-emption, and not specific performance. In the said case, it was held *inter-alia* that where a pre-emptor failed to comply with the direction to deposit 1/3rd of the pre-emption money within a time fixed by the Court, the suit for pre-emption was liable to be dismissed; and that in such a scenario, the Court could not condone the default in exercise of its powers conferred under section 148 C.P.C. The Hon'ble Supreme Court, in the case of Shabbir Ahmed Vs. Zahoor Bibi (*supra*) drew a distinction between decrees for specific performance, and decrees for pre-emption in the following terms:-

“17. Decrees for specific performance and for pre-emption suits are altogether different. The pre-emption decree is required to be formulated in accordance with the provisions of Order XX, rule 14 of C.P.C. In case of failure to deposit the pre-emption money, the suit is to be dismissed. In above Rule 14 requiring payment of purchase money in Court is a mandatory provision and its non-compliance entails positive and negative penalties barring application of general principles that technicalities should not be permitted to hinder justice and rule of substantial justice. The provisions of Order XX, Rule 14(1) are penal in nature, strict compliance whereof is necessary to impose on the party the penalty of dismissal of suit, whereas a suit for specific performance is entirely on different footing and the principle applicable in pre-emption suit cannot be invoked in a suit for specific performance.”

(Emphasis added)

21. As regards the case of Ghulam Murtaza Vs. Ghulam Jillani (*supra*), relied upon by the learned counsel for the petitioners, the same relates to a suit for partition and possession. In the said

case, the Hon'ble Peshawar High Court held *inter-alia* that the powers conferred under section 148 C.P.C. could only be exercised when the matter has not been finally resolved, and the Court is still seized of the matter. Furthermore, it was held that where a Court finally adjudicates a matter and passes a final decree, it becomes *functus officio* and as such cannot exercise the powers under section 148 C.P.C. The case of Mirza Zahoor Hussain Vs. Mirza Munawar Hussain (*supra*) also does not relate to a suit for specific performance. It relates to a suit for possession, which was decreed subject to making-up the deficiency in the Court fees within a specified period. An application had been filed for an extension in time for making-up the said deficiency in Court fees. It was held by the Hon'ble Lahore High Court that since the decree passed in the case was final and self-executory, the trial Court had no jurisdiction to entertain an application for extension of time.

22. In view of the above, the instant petition is allowed; the impugned orders dated 02.02.2018 and 07.02.2018, passed by the learned civil Court in the absence of the petitioners are declared as unlawful, and therefore, are set-aside. Respondent No.2's first application for extension of time filed on 01.02.2018 shall be deemed to be pending. The learned civil Court shall decide the said application after hearing the petitioners. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2018.

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**