

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.411 of 2016
Haji Muhammad Yasin
Versus

Wasi-ud-Din Ahmed Zubairi and others

Date of Hearing: 13.10.2020
Petitioner by: Sardar Muhammad Ashfaq Abbasi,
Advocate
Respondents by: Respondents No.1 and 2 *ex parte*
Mr. Shahid Murtaza Bukhari, Advocate
for respondent No.3

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioner, Haji Muhammad Yasin, impugns the judgment and decree dated 29.07.2016 passed by the Court of the learned Additional District Judge, Islamabad, whereby the petitioner's appeal against the judgment and decree dated 26.10.2015 passed by the Court of the learned Civil Judge, Islamabad was dismissed. Vide the said judgment and decree dated 26.10.2015, the learned Civil Court dismissed the petitioner's suit for specific performance of the agreement to sell dated 14.02.1995. However, respondent No.1 (Wasi-ud-Din Ahmed Zubairi) was directed to return double the amount of the earnest money (i.e. Rs.2,00,000/-) along with profit.

2. The record shows that on 14.02.1995, an agreement to sell (**Exh.P1**) was executed between the petitioner/purchaser and respondent No.1/seller for the sale of Plot No.194, measuring 600 square yards situated at Sector D-12/2, Islamabad ("**the suit plot**") for a total sale consideration of Rs.11,75,000/- out of which Rs.2,00,000/- had been paid as earnest money. In the said agreement, it was explicitly mentioned that the balance sale consideration amounting to Rs.9,75,000/- would be paid on or before 25.02.1995 at the time of the submission of the transfer application for the suit plot in the office of the Capital Development Authority ("**C.D.A.**"). It was also mentioned that respondent No.1 would be responsible to execute

deeds of attorney/transfer with respect to the suit plot in favour of the petitioner or his nominee on or before 25.02.1995.

3. Neither was the balance sale consideration paid by 25.02.1995 nor was an application for the transfer of the suit plot submitted to the C.D.A. by the said date.

4. The petitioner's case is that on 23.02.1995, he informed in writing (Exh.P3) the property dealer, who had brokered the deal, about his readiness to make the balance payment. It was not until 30.03.1995 that a legal notice (Exh.P5) was sent on the petitioner's behalf to respondent No.1 calling upon the latter to comply with the provisions of the agreement to sell dated 14.02.1995 and to transfer the suit plot in the petitioner's favour on payment of the balance sale consideration. On 27.04.1995, respondent No.1 sent a reply to the said legal notice (Exh.P8), wherein it was asserted that it was the petitioner who had not complied with the requirements of the said agreement to sell by paying the remaining sale consideration by 25.02.1995 and that this resulted in the deal being aborted. On 15.05.1995, the petitioner sent another legal notice (Exh.P9) again asking respondent No.1 to *inter alia* complete the transaction.

5. On 12.11.1995, the petitioner filed a suit for specific performance of the said agreement to sell against respondent No.1 and his wife before the Court of the learned Civil Judge, Islamabad. On 30.05.1996, a written statement was filed by respondents No.1 and 2 contesting the petitioner's claim in the suit.

6. Vide order dated 25.07.1996, the learned Civil Court framed issues from the divergent pleadings of the contesting parties. The petitioner appeared as PW-1 whereas respondents No.1 and 2 appeared as DW-1 and DW-2, respectively. Vide judgment and decree dated 27.03.2002, the said suit was dismissed by the learned Civil Court. The petitioner's appeal against the said judgment and decree met the same fate vide judgment and decree dated 06.07.2009 passed by the learned Appellate Court. The said concurrent judgments and decrees were assailed by the petitioner in regular second appeal No.5/2009 before this Court. Vide judgment dated 25.11.2014, the said appeal was allowed; the concurrent

judgments and decrees passed by the learned Courts below were set-aside and the matter was remanded to the learned Civil Court for a decision afresh in the light of the observations made by this Court in the said judgment.

7. The post-remand proceedings culminated in the judgment and decree dated 26.10.2015, whereby the learned Civil Court once again turned down the petitioner's prayer for a decree for specific performance but held that he was entitled to be paid by respondent No.1 double the amount of earnest money (i.e. Rs.2,00,000/-) along with profit. The petitioner's appeal against the said judgment and decree was dismissed vide judgment and decree dated 29.07.2016 passed by the learned Appellate Court. The said concurrent judgments and decrees have been assailed by the petitioner in the instant civil revision petition.

8. Vide order dated 03.07.2018 passed by this Court, respondents No.1 and 2 were proceeded against *ex parte* after they failed to appear in response to the publication of notices in the *Daily Jang*.

9. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant civil revision petition, submitted that at all material times, the petitioner was ready, willing and able to pay the remaining sale consideration of Rs.9,75,000/- for the suit plot; that it was respondent No.1, who backed out from the deal and refused to submit an application for the transfer of the suit plot in the office of C.D.A.; that respondent No.1 also failed to clear the dues against the suit plot so that it could be transferred in the petitioner's favour; that as early as 23.02.1995, the petitioner informed the property dealer, who had brokered the deal, about his readiness to perform the agreement; that after several phone calls, a legal notice was sent on the petitioner's behalf to respondent No.1 on 30.03.1995 calling upon the latter to fulfill his obligations under the agreement; that the reply to the said legal notice was evasive and contrary to the facts; that vide another legal notice dated 15.05.1995, the petitioner again requested respondent No.1 to fulfill his obligations under the agreement but to no avail; and that the learned Courts below committed a jurisdictional irregularity by not decreeing the

petitioner's suit for specific performance. Learned counsel for the petitioner prayed for the civil revision petition to be allowed and for the concurrent judgments and decrees passed by the learned Courts below to be set-aside.

10. I have heard the contentions of the learned counsel for the petitioner and have perused the record with his able assistance.

11. The facts leading to the filing of the instant civil revision petition have been set out in sufficient detail in paragraphs 2 to 8 above and need not be recapitulated.

12. Under the terms of the agreement to sell dated 14.02.1995, the balance sale consideration amounting to Rs.9,75,000/- had to be paid by the petitioner on or before 25.02.1995 at the time of the submission of the transfer application to the C.D.A. The petitioner (PW-1) in his evidence did not produce any bank statement or any other document to show that he had sufficient amount to pay the balance sale consideration by 25.02.1995. Although the petitioner relied on Exh.P3 to show that he had informed the property dealer, who had brokered the deal, about his readiness to pay the remaining sale consideration but he chose not to produce the property dealer as a witness so that his testimony could be corroborated.

13. The agreement to sell also provided that respondent No.1 would be responsible to execute deeds of attorney/transfer of the suit plot in favour of the petitioner or his nominee on or before 25.02.1995. Assuming that the transfer of the suit plot in the C.D.A. could not take place by 25.02.1995 due to the non-clearance of dues with respect to the said plot, the petitioner could have asked respondent No.1 to execute a deed of attorney in his favour or in favour of his nominee by 25.02.1995. This, the petitioner did not do.

14. This Court while remanding the matter to the learned Civil Court, vide judgment dated 25.11.2014, observed that the learned Courts below had not adverted to the legal implication regarding Section 49E of the Capital Development Authority Ordinance, 1960, which provides *inter alia* that no Court or other authority shall have jurisdiction to question the legality of anything done or any action taken under the said Ordinance by or at the instance of the Authority.

Since the case at hand did not involve any action that had been taken by the C.D.A. or any action of the C.D.A. that was in controversy between the parties, the said Section was of no relevance in deciding the controversy between the parties.

15. It is well settled that specific performance is a discretionary remedy and in granting the relief of specific performance, the Court has to act actively and in such a manner that no prejudice, loss or injury is caused to any party. The learned Courts below have adequately protected the petitioner's interest by directing respondents No.1 and 2 to return double the earnest money along with profit at the bank rate. The record does not show that the petitioner had expressed his willingness before the learned Civil Court to deposit the remaining sale consideration in the Court. It is also well settled that even if the agreement is proved but the Court is of the view that the grant of the relief of specific performance would not meet the ends of justice, such relief can be denied.

16. Since I have been given no reason to interfere with the well reasoned concurrent judgments and decrees of the learned Courts below, the instant civil revision petition is dismissed with no order as to costs.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE)

*Qamar Khan**