

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A.No.139/2013
Mst. Murshida Khatoon

Versus

Ch. Abdul Rehman Sahi and another

Date of Hearing:	10.06.2019
Appellant by:	Mr. Muhammad Wajid Hussain Mughal, Advocate,
Respondents by:	Mr. Ali Jamal Salis Khawaja, Advocate for respondent No.1 Ms. Sitwat Jehangir, for respondent No.2

MIANGUL HASSAN AURANGZEB, J:- Through the instant regular first appeal, the appellant (Mst. Murshida Khatoon), impugns the judgment and decree dated 05.10.2013, passed by the Court of the learned Civil Judge, Islamabad, whereby the suit for specific performance of the agreement to sell and permanent injunction instituted by respondent No.1 (Ch. Abdul Rehman Sahi) against the appellant, was decreed subject to the payment of the remaining sale consideration.

2. The facts essential for the disposal of the instant appeal are that on 25.06.2007, the appellant and respondent No.1 entered into an oral agreement, whereby the former agreed to sell plot No.49, street No.82, G-13/1, Islamabad ("the suit property") to the latter.

3. Respondent No.1 in his suit asserted that the agreed sale consideration for the suit property was Rs.45,00,000/-, out of which Rs.2,00,000/- had been paid as earnest money to the appellant. The appellant, in her written statement, took the position that the agreed sale consideration was Rs.50,50,000/-, out of which only Rs.20,000/- was paid as token money.

4. The contesting parties blame each other for not performing their respective obligations under the oral agreement. Respondent No.1 asserts that the appellant had demanded more money for completing the transaction, whereas the appellant asserts that respondent No.1 could not arrange the remaining sale consideration so as to complete the transaction.

5. The suit instituted by respondent No.1 on 16.11.2007 was contested by the appellant by filing a written statement. From the divergent pleadings of the contesting parties, the learned Civil Court framed the following issues:-

- “1. *Whether the plaintiff and defendant No.1 entered into an oral agreement to sell in respect of plot for an amount of Rs.45,00,000/- and sum of Rs.2,00,000/- was paid by the plaintiff to defendant No.1 as earnest money if so, its effect? OPP*
2. *Whether the sale price of disputed plot was fixed at Rs.50,50,000/- and only Rs.2,00,000/- were paid by the plaintiff as token money if so, its effect? OPD*
3. *Whether the time was essence of the contract if so what is its effect? OPD*
4. *Whether plaintiff has no cause of action? OPD*
5. *Whether the plaintiff is estopped to file the instant suit? OPD*
6. *Whether the defendant No.1 is entitled to special costs under section 35-A of CPC? OPD*
7. *Whether the plaintiff is entitled to decree as prayed for? OPD*
8. *Relief.”*

6. Respondent No.1 appeared as PW-2, whereas Zaheer Ahmed, Assistant Record Keeper, F.G.E.H.F. gave evidence as PW-1. The appellant appeared as DW-1. After recording of evidence, the learned Civil Court, vide judgment and decree dated 05.10.2013, decreed respondent No.1's suit subject to the payment of the remaining sale consideration. The said judgment and decree has been assailed by the appellant in the instant appeal.

7. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that the sale consideration for the suit property was agreed to be Rs.50,50,000/- out of which only Rs.20,000/- was paid as token money whereas the remaining amount was payable at the time of the transfer on or before 23.07.2007; that the transaction could not be completed due to respondent No.1's inability to come up with the required amount; that since time was the essence of the agreement, the failure on the part of respondent No.1 to complete the transaction on or before 23.07.2007 resulted in the cancellation of the agreement and the forfeiture of the earnest money; that Exh.P/3 was indeed signed by the appellant, but she had not filled the details in the said document; that in Exh.P/3, the mentioning of Rs.45,00,000/- as sale

consideration is not correct; and that the appellant had not been given an opportunity to read the said document.

8. Furthermore, learned counsel for the appellant submitted that F.G.E.H.F. had fixed 16.07.2007 as the date for the transfer of the suit property; that on respondent No.1's request, the appellant had applied for an extension in the date for the transfer of the suit property; that subsequently, F.G.E.H.F. had fixed 23.07.2007 as the date for the transfer of the suit property; that respondent No.1 did not come up with the remaining sale consideration so that the suit property could be transferred on the said date; and that respondent No.1 had not even deposited the remaining sale consideration in the Court. Learned counsel for the appellant prayed for the appeal to be allowed and for the impugned judgment and decree dated 05.10.2013 to be set-aside.

9. On the other hand, learned counsel for respondent No.1 submitted that the appellant cannot rely on selected portions of Exh.P/3 and disregard the rest on the ground that she had not read the document which she had signed; that the document (Exh.P/3) signed by the appellant shows that the sale consideration was Rs.45,00,000/- out of which the appellant had received Rs.2,00,000/- as earnest money; that on the two dates fixed by F.G.E.H.F. for the transfer of the suit property, the appellant had not appeared so that the transfer could be made; that respondent No.1 had the requisite funds for the payment of the balance sale consideration for the suit property; that it was the appellant's greed and demand for payment of an amount additional to the agreed sale price which caused the transaction not to be completed; that there was no understanding or agreement between the parties that the token money would be forfeited if the remaining sale consideration was not paid; and that there was no agreement to sell in writing and there was no time agreed between the parties within which the sale transaction was to be completed. Learned counsel for respondent No.1 prayed for the appeal to be dismissed.

10. We 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 appeal are set out in sufficient detail in paragraphs No. 2 to 7 above and need not be recapitulated.

11. A written agreement to sell between the appellant and respondent No.1 does not exist. The oral agreement to sell is reflected in the appellant's application dated 03.07.2007 (Exh.P/3) submitted to F.G.E.H.F. seeking the transfer of the suit property in favour of respondent No.1. This document shows that the agreed sale consideration for the suit property was Rs.45,00,000/- out of which an amount of Rs.2,00,000/- had been paid as token money. This document has been signed by the appellant, who is admittedly an educated lady. The contents of the said document cannot be partially believed and partially disbelieved by this Court. The appellant cannot take a position that although the said document was signed by the appellant, she was not aware of its contents. Such a contradictory stance taken by the appellant cannot be permitted by the Court while exercising equitable jurisdiction. Therefore, it would be safe to hold that the agreed sale consideration was Rs.45,00,000/-, out of which Rs.2,00,000/- had been received by the appellant as token money.

12. Respondent No.1 had also submitted an application on 03.07.2007 (Exh.P3/3) for the transfer of the suit property in his favour. It now needs to be determined as to who was at fault for not completing the sale transaction. It is not disputed that initially, 16.07.2007 had been fixed by F.G.E.H.F. for the transfer of the suit property and subsequently, this date was extended on the appellant's application to 23.07.2007. Neither the appellant nor respondent No.1 appeared before F.G.E.H.F. on the said dates. Respondent No.1, in his cross-examination, had deposed that he had not attended the office of F.G.E.H.F. on 23.07.2007. If respondent No.1's version is to be accepted that the appellant had become reluctant to complete the sale transaction by transferring the suit property in respondent No.1's favour, it does not appeal to

reason as to why respondent No.1 remained silent until 29.10.2007 when he issued a legal notice to the appellant requiring the transfer of the suit property.

13. Since respondent No.1 was well aware that F.G.E.H.F. had fixed 23.07.2007 as the date for the transfer of the suit property, he ought to have not just appeared before F.G.E.H.F. on the said date, but should also have come up with the remaining sale consideration in the form of a cheque or pay order to show his *bona-fides* as well as his readiness, willingness and ability to complete the sale transaction. Respondent No.1's omission to do all this, rendered him disentitled to the equitable relief of specific performance.

14. Zaheer Ahmed, Assistant Record Keeper of F.G.E.H.F. appeared as PW-1 and in his cross-examination deposed that respondent No.1 did not come to F.G.E.H.F. on 16.07.2007 and 23.07.2007 for the transfer of the suit property. He also deposed that respondent No.1 was supposed to appear before F.G.E.H.F. for the transfer of the suit property within twenty days of F.G.E.H.F.'s letter dated 27.09.2007 (Exh.P/6). Exh.P/6 is a letter addressed by F.G.E.H.F. to respondent No.1 requiring the latter to appear before the Admitting Officer for the transfer of the suit property within a period of twenty days failing which withdrawal of the transfer application would be processed. It is an admitted position that respondent No.1 had not, at any material stage, appeared before F.G.E.H.F. for the transfer of the suit property within a period of twenty days of the issuance of the said letter dated 27.09.2007 (Exh. P/6).

15. The mere fact that respondent No.1 did not appear before F.G.E.H.F. either on 16.07.2007 or 23.07.2007 along with the remaining sale consideration adds credence to the appellant's stance that respondent No.1 did not have the requisite funds to pay the remaining sale consideration.

16. Although vide legal notice dated 29.10.2007 (Exh.P/10) respondent No.1 had required the appellant to receive the remaining sale consideration and complete the transfer of the suit

property, it ought to be borne in mind that the said notice was sent much after the dates, which had been fixed by F.G.E.H.F. for the transfer of the suit property. Additionally, the said legal notice was sent after the appellant had filed an application dated 13.08.2007 before F.G.E.H.F. seeking withdrawal of the application for the transfer of the suit property.

17. After the filing of the suit for specific performance, respondent No.1 did not apply to the learned Civil Court for the deposit of the remaining sale consideration. This is yet another reason why respondent No.1's suit for specific performance should not have been decreed. In the case of Hamood Mahmood Vs. Mst. Shabana Ishaq (2017 SCMR 2022), the Hon'ble Supreme Court held as follows:-

"It is mandatory for the person whether plaintiff or defendant who seeks enforcement of the agreement under the Specific Relief Act 1877, that on first appearance before the Court or on the date of institution of the suit, it shall apply to the Court getting permission to deposit the balance amount and any contumacious/omission in this regard would entail in dismissal of the suit or decretal of the suit, if it is filed by the other side."

18. As mentioned above, the appellant had submitted an application (Exh.P/3) to F.G.E.H.F. for the transfer of the suit property in respondent No.1's favour. In this document, which has been signed by the appellant, it is clearly acknowledged that she had received an amount of Rs.2,00,000/- as token money. It is an admitted fact that the appellant did not issue any notice to respondent No.1 requiring the latter to come up with the remaining sale consideration in order to complete the sale transaction. More importantly, there is no notice on the record from the appellant warning respondent No.1 that in the event the latter did not complete the transaction by paying the remaining sale consideration, the token money would be forfeited by the appellant. In the absence of such a notice, we are of the view that the appellant is not justified to retain the said amount of Rs.2,00,000/- paid to her as token money. She is bound to return the said amount along with mark up at the rate of 10% per annum.

19. In view of the above, the instant appeal is allowed and the impugned judgment and decree dated 05.10.2013 is set-aside. There shall be no order as to costs.

(CHIEF JUSTICE)

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2019

(CHIEF JUSTICE)

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*

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