

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT,**  
**ISLAMABAD**

R.F.A. No.115 of 2013  
Mudassar Ali  
Versus  
Muhammad Zafar Iqbal Pirzada, etc.

Appellant by: Mr. Yasir Yousaf Abbasi, Advocate,  
Respondents by: Mr. Shakir Javed and Syed Masood  
Hussain, Advocates.  
Date of Hearing: 24.02.2021.

**FIAZ AHMAD ANJUM JANDRAN, J.-** Through this judgment we propose to decide the instant Regular First Appeal (**the appeal**) which emanates from the judgment & decree dated 22.12.2012, passed by the learned Civil Judge 1<sup>st</sup> Class, Islamabad-West, whereby suit for specific performance, mandatory and permanent injunction (**the suit**) filed by the appellant was dismissed.

2. Essential and relevant facts for disposal of the appeal, are that the appellant and respondent No.1 entered into an agreement to sell Ex.P1/2 (hereinafter to be described as **the sale agreement**) on 01.06.2004 regarding House No. 207 (measuring 311.11 sq. yards), Street No.99, Sector I-8/ 4, Islamabad (hereinafter to be referred as **the subject house**). Total sale consideration with the mutual consent of the parties in presence of the witnesses was fixed as Rs.10-Million. An amount of Rs.2-Million was paid by the appellant as earnest money while the remaining amount of Rs.8-Million was to be paid within a period of two months with a grace period of one month.

3. On 09.10.2004 appellant had filed a suit for specific performance of the sale agreement, which was contested by

the respondent No.1 by filing written statement, wherein the sale agreement was admitted but dismissal of the suit was sought on the ground that appellant failed to pay remaining sale consideration within prescribed time. That he sent a notice to him for forfeiture of the earnest money and cancellation of the sale agreement.

4. Learned counsel for the appellant sought acceptance of the appeal on the ground that respondent No.1 was in need of Rs.1.1-Million in addition to Rs.2-Million already received by him. Appellant had paid him said Rs.1.1-Million through two cheques and time for payment of remaining sale consideration was extended by way of new agreements Ex.P2 and Ex.P3. There was no default on the part of appellant but learned trial Court has illegally dismissed the suit.

5. On the other hand learned counsel for the respondent No.1 stood behind the decree of the trial court dismissing the suit. He argued that the agreements Ex.P2 and Ex.P3, whereby time was extended are forged and fictitious and were not signed by the respondent No 1. That the appellant failed to fulfill his part regarding performance of the sale agreement, therefore suit was rightly dismissed.

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

7. Through the appeal, the appellant prays for a decree of specific performance regarding the sale agreement in a suit filed on 09.10.2004, it is observed, when jurisdiction is assumed in the matter like in hand, the principles of equity are applicable with full force.

8. Relief of the Specific performance having its origin/ roots in equitable system of justice, wherein amongst others the hallmark principle is that **He who comes to equity must come with clean hands.** The word "must" retains significance and depicts the intent of authors, introducers of the maxim. The Supreme Court of United States in **"Keystone Driller Co. v. General Excavator Co."** (290 U.S. 240 1933) elaborated the principle in the following terms:-

*"It is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matters is controversy should be placed before the court.*

*Story's Equity Jurisprudence, 14<sup>th</sup> ed.,s 98. The governing principle is 'that whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.*

*Pomeroy, Equity Jurisprudence, 4<sup>th</sup> ed., s 397. This Court has declared; "It is a principle in chancery that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court abettor of iniquity." Bein v. Heath. 6 How. 228, 247*

*It has been suggested that where plaintiff has a fraudulent intent and commits an overt act in attempting to effectuate that intent, he comes within the maxim irrespective of injury to the defendant. See Curtin v. Benson, 222 U.S. 78, 85." [Emphasis added]*

9. He who comes to equity must come with clean hands is the principle that sets the foundations upon which equitable powers of court rest. The person claiming equitable relief has to show not only, that he has a meritorious cause but also he has knocked the doors of court with clean hands. This Court while adhering to equitable principles is bound to do justice between parties as per dictates of judicial conscience.

10. Law on the subject does not extend any grace to the party who play fraudulently with the matter. Claims are agitated, investigated and scrutinized through a process, including recording of evidence both oral as well as documentary. During this process, when enquired on the touchstone of golden principles of equity, it is found that a party who is playing with the claim, eventually court, being a court of good conscience regrets for the relief sought due to said conduct/action.

11. Thus to substantiate a claim for having equitable relief through specific performance, lis is required to be bifurcated into two counts:-

- i) case should be on merits,
- ii) applicant/plaintiff must approach the court with clean hands.

12. If a litigant intends to seek remedy of specific relief but chooses improper, deceiving, fraudulent means to reach the destination the same would be against good conscience. In such eventuality, if the court aids such litigant for approaching the destination, in humble view of this court, amounts to inequity. The court cannot act as abettor to a party who is ill-motivated and knocking the door of court of justice with unfair conduct concerning the matter in

controversy, both the requirements as mentioned in para-11 supra must therefore co-exist.

13. Before proceeding further it is essential to examine the evidence produced by the parties, as matter is continuation of original proceedings. Relevant portion of the statement by way of cross-examination of the appellant as PW-1 is available, wherein it is stated that:

یہ درست ہے کہ Ex.P3 پر بھی کسی گواہ کے دستخط نہ ہیں۔

PW-1 further narrated in the following words:-

یہ درست ہے کہ میرے پاس کوئی ایسا ثبوت نہ ہے کہ Ex.P4 مدعا علیہ نمبر 1 کے وصول کیا تھا اور میں نے Ex.P4 اس کے حوالے کیا تھا۔

Respondent No.1 in his evidence as DW-1 explicitly stated regarding Ex.P2 & Ex.P3 in the following words:-

اس default سے بچنے کے لیے انھوں نے دو اسٹامپ پیپر Ex.P2 اور Ex.P3 جعلی طور پر تیار کیے۔ جس پر میرے دستخط اور انگوٹھا دونوں جعلی ہیں۔

Respondent No.1 in cross-examination affirmed his stance qua the examination in chief in the following words:-

مجھے Ex.P1/2 کی میعاد ختم ہونے سے پہلے کچھ رقم کی ضرورت نہ تھی۔ میں نے Ex.P4 اور Ex.P5 کے تحت بذریعہ ڈیلر کوئی رقم وصول نہ کی ہے۔ میں اب تک مدعی سے اکتیس لاکھ روپے نہ لے چکا ہوں۔ Ex.P2 اور Ex.P3 پر میرے جعلی دستخط اور انگوٹھا ہیں۔ اور یہ بھی غلط ہے کہ Ex.P4 کی رقم مبلغ پانچ لاکھ اور Ex.P5 کی رقم مبلغ چھ لاکھ روپے میں نے وصول کر لیے۔

14. The facts of the case in hand, side by side evidence have been judicially examined and it is found that Ex.P2 and Ex.P3 regarding which appellant has put forward his stance that same were executed by the respondent No.1, when denied explicitly, the burden to prove the same was upon

the shoulder of the appellant. Evidence has been examined, appellant badly failed to prove the said two documents. Said two documents admittedly carrying a financial transaction, wherein a financial nature transaction is described. Same is in negation of the provisions of the Qanun-e-Shahadat Order, 1984 (**Order of 1984**) qua Article 17. Admitted position as per these documents is that there is no mention of any witness to the said documents and the only alleged executant is the respondent No.1 who has unequivocally stated that his signatures are forged. He went on saying that he is ready for the verification of the said signatures but appellant never opted said option, the presumption is against the appellant when he did not accepted challenge/offer of the respondent qua having said test, needless to be mentioned that appellant was required to prove the document.

15. The respondent No.1 also produced one Shabbir Ahmad, an employee of the Union Bank as DW-2, who appeared along with record of the cheques Ex.P4 & Ex.P5. The witnesses in examination in chief stated that as per record Ex.P4 was got en-cashed by one Muzammil Hussain and Ex.P5 by Muhammad Afzal. He further stated that Ex.P4 and Ex.P5 were not cross-cheques, rather they were bearer cheques and anyone could en-cash the same. The witnesses in cross examination re-iterated the stance.

16. Said witness in cross-examination reiterated his stance contained in the examination in chief regarding encashment of the cheques.

17. There remains no doubt that the stance of the appellant qua payment of Rs.1.1 Million to the respondent

No.1 is not correct being explicitly denied by the said respondent for want of evidence. It is established that his assertion qua payment of said amount to the respondent No.1 was mere an assertion. It is settled principle that documentary evidence carries much weight and in a case where there is contest, the oral evidence would give way to the documentary evidence. The documentary evidence in the case, as mentioned above, was furnished by DW-2, an independent witness/ employee of the bank, which are the cheques. The said witness also endorsed the stance of respondent No.1 in express terms by repelling the assertion of the appellant.

18. It is further noticed while evaluating the material available in the light of principles as stated in supra paras that one who seeks the assistance of the equity court is required to act in good faith and in an unblemished manner without playing any misdeed or fraudulent action, particularly in respect of the matter agitated before the court, there remains no doubt in humble view of the court that conduct of the appellant was not only tainted with malafide but he approached the court with infamy on his lips.

19. No one can claim any benefit arising out of his own fraud and to seek specific performance with such a wrong doing.

20. The sale agreement Ex.P1/2 when examined, demonstrate the two witnesses but only one witness was presented and that too in his evidence corroborated the version of the respondent No.1 by stating in the words that he was aware of the matter till the payment of Rs.2 Million and thereafter, if any assertion/stance is of the appellant, he

is not witness to that. As per statutory provisions of the Order of 1984 when a transaction is reduced into writing carrying a financial matter, requires attestation of two independent witnesses and when in the case at hand said two witnesses are mentioned in the said Ex.P1/2 but only one is presented and that too in a way as referred above, what rests with the case of the appellant.

21. No right could be conferred upon any individual to have a transaction of Rs.10-Million who by making of payment of Rs.2-Million, linger on the matter for indefinite period particularly when value of the properties is increasing day by day and sought specific performance according to his own whims and wishes.

22. 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 v. Gul-e-Nasreen (2019 SCMR 1880), Muhammad Abdul Rehman Qureshi v. Sagheer Ahmad (2017 SCMR 1669), Farzend Ali v. Khuda Bakhsh (PLD 2015 SC 187), Adil Tiwana v. Shaukat Ullah Khan Bangash (2015 SCMR 728), Ghulam Nabi v. Muhammad Yaqoob (PLD 1983 SC 344) and Sirbuland v. Allah Lok (1996 SCMR 575).***

23. Now coming to the other aspect of the appeal which is in respect of Rs.2-Million paid as earnest money by the appellant 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 2004 and above all if the subject land was purchased in the year 2004, then in 2021 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 view of the Court, said principles 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 premium, same will be unfair and unjust on the touchstone of equitable principles, therefore, the respondent No.1 is directed to return double of the amount i.e. Rs.2-Million over and above of the earnest money i.e. Rs.2-Million already received (in total Rs.4-Million including earnest money) within a period of thirty days from the date of this judgment.

24. Reaching in above conclusion this court has taken wisdom from the judgments of the Hon'ble Apex Court reported as "***Sheikh Akhtar Aziz v. 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."*

In another case **"Shaukat Ullah Khan Bangash v. 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."* [Emphasis added]

25. The sequel of above discussion is that appellant has not been able to make out a case warranting interference in the impugned judgment & decree which, in the backdrop of above discussion, is well reasoned and does not call for any interference. However, respondent No.1 is directed to return double of the amount i.e. Rs.2-Million over and above of the earnest money i.e. Rs.2-Million already received (in total Rs.4-Million including earnest money) to the appellant within a period of thirty days from the date of this judgment.

26. With above modification, the appeal is **dismissed** along with all C.Ms.

(MOHSIN AKHTAR KAYANI) (FIAZ AHMAD ANJUM JANDRAN)  
JUDGE JUDGE

Imran

Approved for reporting.