

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MUSHIR ALAM
MR. JUSTICE YAHYA AFRIDI
MR. JUSTICE QAZI MUHAMMAD AMIN AHMAD

AFR

CIVIL PETITION NO.593 OF 2020

Against the judgment dated 30.1.2020
passed by High Court of Sindh at
Karachi in HCA No.252 of 2019

Performance Automotive (Pvt.) Ltd.

...Petitioner(s)

VERSUS

Akbar Adamjee & others

...Respondent(s)

For the Petitioner(s):

Mr. Muhammad Umar Lakhani, ASC
Mr. Mehmood A. Sheikh, AOR

For the Respondent No.1:

Kh. Shams-ul-Islam ASC
(via video link, Karachi)

For Respondents No.2-3:

Mr. Nisar A. Mujahid, ASC
Raja Abdul Ghafoor, AOR

Date of Hearing:

16.4.2021

ORDER

MUSHIR ALAM, J.— Present Petitioner-Performance Automotive (Pvt.) Ltd. has impugned the judgment dated 30.01.2020 passed by learned High Court of Sindh at Karachi in H.C.A. No.257 of 2019 whereby maintained the order dated 2.7.2019 passed by the learned Single Judge High Court of Sindh, granting CMA No.14489 of 2018 under Order XXXIX Rule 1 & 2 CPC was allowed, whereas CMA Nos. 16710 & 16711 of 2018 were dismissed consequently. The mandatory injunction was granted in suit No.1929 of 2018.

2. Brief facts appears to be that the Respondent No.1-Akbar Adamjee entered into Vehicle Order Agreement dated 26.5.2017 followed by modification agreement¹ dated 15.6.2017 (*page 81 of the file*) for shipment and delivery of luxury car make Porsche, Panamera Turbo S E-Hybrid MY 18 (Model 2018) with specific exterior colour Vulcan Grey Metallic and interior colour, two-tone leather interior Black and Saddle Brown, smooth finish leather for a total consideration of US \$ 3,36,900/- including all customs duties and clearance charges applicable thereto. In terms of the agreement 50% payment was to be made was made in advance to confirm sale and balance 50% was to be paid upon shipment confirmation of the vehicle by the manufacturer (Respondent No.3). The tentative delivery date per clause 34 of the agreement was agreed to be six months (i.e. by 12.12.2017) subject to order booking (i.e. 50% advance payment and transfer of fund in the account of the manufacturer).

3. It appears from the record that the vehicle was shipped on vessel "CPM CAPE MAYOR" on 4.4.2018 and arrived at Karachi Port on 28.4.2018. The shipment was made in favour of the Petitioner as consignee and the respondent/plaintiff remained in touch with the petitioner for the delivery of the vehicle. However, car could not be got cleared from the Custom Authority on one pretext or the other. On 20.7.2018, it transpired that the State Bank of Pakistan, imposed restriction on "Open Account Basis" import. It also appears from the record that grace period was extended to the importers for compliance of the requisite formalities to file Goods Declaration ("**GD**") for clearance of

¹ Page 81 of the Paper Book

the vehicle, but the Petitioner failed to avail such concession as well.

4. Respondent-Akbar Adamjee filed a suit No.1929 of 2018 on 15.10.2018 for specific performance, declaration, direction, injunction and damages alongwith application under Order XXXIX Rule 1 & 2 CPC. The application was contested and ultimately allowed and Application for mandatory injunction was granted through detail and reasoned order 2.7.2019 in the following terms:

- "(i) The Defendant No.1 is directed to immediately file GD with Defendant No.4, who is directed to process the same without being influenced with F.E. Circular No.7 of 2018 as the same is not applicable on the import in question for which Bill of Lading has already been issued on 9.4.2018. If needed, Defendant No.4 may also exercise the powers conferred upon the Additional Collector pursuant to Public Notice No.02/2016 for exemption from issuance of EIF.*
- (ii) The Customs Duty/taxes and all other charges for clearance are to be paid by Defendant No.1 as already agreed in the contract.*
- (iii) The defendant No.4 and 5 shall ensure that in any case the Vehicle in question is not delivered to Defendant No.1 or anyone else on its behalf, after the GD is out of charge, or even for the purposes of Re-export, and shall be handed over to the Nazir of this Court once the same is processed and is out of charge and ready for delivery.*
- (iv) The Nazir of this Court after obtaining delivery as above shall hand over the Vehicle to the Plaintiff upon proper receipt. Nazir's fee is settled at Rs.30,000/- which shall be paid by the Plaintiff.*
- (v) Before delivery of the Vehicle to the Plaintiff, the Nazir shall obtain a Bank Guarantee for an amount of Rs.1,458,830/- to secure the claim of Defendant No.1 in*

respect of sale consideration due to fluctuation of rate of exchange as claimed. The fate of this Bank Guarantee will be subject to final decision of the Suit."

The said order was challenged in appeal unsuccessfully, learned division bench through impugned judgment dated 30.1.2020 maintained the order of the Single Judge.

5. It was contended by the learned counsel for the petitioner that the petitioner-company is an agent of dealer for the subject vehicle i.e. Porshëa-Respondent No.3 and on account of some impending/issues with the Custom Authority, the clearance could not be affected. Consequently, the agreement was cancelled through communication dated 15th October, 2018 (Page 170 of the file) and the respondent No.1/Plaintiff was directed to collect refund and since agreement stood terminated and cancelled, therefore, specific performance could not be granted.

6. Learned counsel for the respondent contends that as entire consideration was paid, damages alone are not the relief as the good/car is of special value, it was custom made with special colour scheme and interior, it is not readily available in the markets in Pakistan. It was stated that the 2018 model of the car was booked in advance in 2017, which was to be custom manufactured and delivered in Pakistan in 2018. According to learned counsel for the Respondent, once the entire consideration of US \$ 3,36,900/- was received as evident from acknowledgment receipt dated 26th December, 2017². The car was manufactured as per specification, trans-shipped and reached the port at Karachi. However, it was claimed by the

² Page 100 of the Paper Book

respondent that an additional sum of Rs.1,458,830/- is due and payable on account of foreign exchange difference, which was not paid. The excess amount as claimed by the petitioner is disputed. The learned single judge while passing mandatory injunction secured the interest of the Petitioner delivery was subject to furnishing of Bank Guarantee in the sum of the disputed amount claimed by the petitioner.

7. Specific performance of movable property is governed under section 58 of the *Sale of Goods Act, 1930* which for convenience is reproduced as follows:

Specific performance. - Subject to the provisions of Chapter II of the Specific Relief Act, 1877, in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the applications of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree.

8. From bare perusal of the provision quoted above, it is evident that specific performance could be ordered in respect of "a specific or ascertained goods". In case breach of contract to deliver specific or ascertained goods occurs, the court may, if it thinks fit, direct the contract shall be performed specifically without giving the defendant option of retaining the goods on payment of damages.

9. "Specific goods" are goods identified and agreed upon at the time a contract of sale is made³. Specific goods mean goods identified and agreed upon at the time of

³ Section 2(14) of the Sales of Goods Act, 1930

contract of sale is made. Ascertained goods is not defined in the Act, 1930. Specific can also be categorized as ascertained goods, if they are or when they become identifiable, determinable and recognizable. In this case, the distinction between specific goods from generic or unascertained goods is integral and each of them must be distinguished.

10. The luxury line of the *Porsche car, new Panamera Turbo S E-Hybrid MY 18 (Model 2018)* was customized and made to order as noted above. It can be classified as specific and ascertained goods in as much as in terms of agreement available⁴. Given that *Porsche* is one of the leading luxury brands with particular exterior and interior specifications and colour mentioned in the agreement, leaves no doubt that it is "*specified or ascertained goods*" within the contemplation of provision quoted above. Once the Respondent has successfully demonstrated that he has fulfilled all the terms and conditions of the agreement section 58 of the Sales of Goods Act, 1930 comes to his rescue

11. Contention of the learned counsel for the petitioner that the specific performance or injunctive relief could not be granted where the damages provide adequate compensation. Contention seemingly, persuasive but, not attracted in respect of "*specific and ascertained goods*." When examined through lens of Section 58 *ibid*; which makes particular mention of "*any suit for breach of contract to deliver specific or ascertained goods*," empowers the court, in appropriate cases, to "*direct that the contract shall be*

⁴ Page 80 of Paper Book

performed specifically, without giving the defendant the option of retaining the goods on payment of damages. This means that damages in cases of 'specific and ascertained' goods are neither substitute, alternate nor adequate relief.

12. In a case reported as Messers Petrocommodities (Pvt.) Ltd v. Rice Export Corporation of Pakistan,⁵ learned division bench of the High Court, while denying injunctive relief, propounded the principle for grant of injunctive relief in cases of specific performance of specific and ascertained moveable property. Operative part after reproducing section 58 *ibid* at page 4 it was held as follow:

"The reproduced section would show that, in the cases covered by it, specific performance can be ordered even in relation to sale of goods. But that, as hinted above, is to be relative to specific or ascertained goods. As regards such goods, section 56 of the Specific Relief Act would not become a bar for grant of permanent injunction, nor an interlocutory injunction may be refused on that score in such behalf. Even then it would always be a question of fact as to whether the goods involved qualify as specific or ascertained goods. A variety of articles may fall under the category of "specific goods", which is defined by section 2(14) of the Sale of Goods Act to involve and mean "goods identified and agreed upon at the time a contract of sale made". An example, which instantly occurs to mind, may be that of a painting or other piece of art or a thing having a special meaning to the buyer. Such goods arguably may be covered by the description."

In the cited case relief was declined as the subject goods was *Basmati Rice* and was not considered to be specific goods. In another case cited as Agha Saifuddin Khan v. Pak Suzuki Motors Company Limited and others.⁶ Was concerned is of a period when Potohar Jeep manufactured in Pakistan, were

⁵ PLD 1998 Karachi 1.

⁶ 1997 CLC 302)

considered to be prized jeep which was available on prior booking after considerable wait, was agreed to be sold to plaintiff. In suit wherein tentative delivery period was six months. Given that there was no justification for withholding the delivery of the vehicle, the learned Single Judge granted the injunctive relief subject to payment of balance consideration and furnishing bank guarantee for claimed amount. Similarly in the instant case, the entire consideration as agreed at the time of the agreement has been paid, subsequent demand raised is disputed and subject to buyer's rights⁷ and final determination at trial. The learned Single Judge in the instant matter has already secured the interest of the petitioner through a Bank Guarantee.

13. The Learned counsel for the petitioner was unable to dislodge the concurrent findings of fact and law against the well-reasoned judgment of the learned Single Judge, as concurred by the learned Division Bench through the impugned judgment. Accordingly, we see no justification to interfere in the impugned judgment. Instant petition is dismissed and leave to appeal is refused.

sd/- J
sd/- J
sd/- J

ISLAMABAD
16th April, 2021
Ars/eb/

"Approved for Reporting"

⁷ Proviso to Section 26 of Sales of Goods Act, 1930