

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Muhammad Ali Mazhar
Mr. Justice Irfan Saadat Khan

Civil Appeal No.51-K/2021

Against the judgment dated
22.02.2021 passed by High Court
of Sindh, Circuit Bench,
Hyderabad, in Second Appeal
No.07/2020

Meer Gul

...Appellant

Versus

Raja Zafar Mehmood through legal heirs & others ...Respondents

For the Appellant: Mr. Naeem Suleman, ASC

For LR's of Mr. Muhammad Suleman Unar, ASC
Respondent No.1: Mr. Ghulam Rasool Mangi, AOR

Respondents No.2 to 6: Ex-parte.

Date of Hearing: 04.04.2024

JUDGMENT

Muhammad Ali Mazhar, J.- This Civil Appeal is directed against the Judgment dated 22.02.2021 passed by the High Court of Sindh, Circuit Bench, Hyderabad, in Second Appeal No.07/2020, whereby the appeal was allowed and F.C. Suit No. 92 of 2011 filed by the appellant was dismissed.

2. The short-lived facts of the case are that the appellant filed a civil suit against the respondents for specific performance and injunction in respect of 129-08 acres out of 160-00 acres in agricultural land bearing Survey Nos. 18, 19, 21, 22, 23, 24, 25, 26, 27, 28 and 29, situated in Deh Lib, Taluka and District Sanghar ("**suit land**"). According to the appellant, the sale consideration was paid in terms of agreement to sell but since the respondent (owners) failed to execute the sale deed, hence the appellant sought directions through the aforesaid civil suit for execution of the sale deed in his favour with consequential relief of injunction. The respondents filed the written statement. The appellant side adduced evidence but nobody appeared on behalf of the respondents to lead the evidence nor the appellant and his witnesses were cross examined. The Trial Court, after hearing the arguments,

dismissed the suit *vide* Judgment and Decree dated 16.02.2016. Being aggrieved, the appellant preferred Civil Appeal No.28 of 2016 which was allowed *vide* Judgment and Decree dated 19.12.2019 with the directions to the appellant to deposit the balance sale consideration of Rupees Two Million only through cross cheque in favour of the respondents Nos. 1 to 3 in the office of Accountant, District Court, Sanghar, who was directed to execute the sale deed in favour of the appellant if the respondent failed to execute the sale deed. The respondents No.1 to 3 challenged the judgment of the Appellate Court *vide* Second Appeal in the High Court of Sindh, Circuit Bench, Hyderabad, which was allowed and as a consequence thereof, the appellate judgment was set aside and the suit of the appellant was dismissed.

3. The learned counsel for the appellant argued that in the absence of any direction by the Trial Court to deposit the balance sale consideration, no penal consequences can be pressed into service. He further argued that the High Court failed to consider the dictum laid down in the case of Muhammad Asif Awan vs. Dawood Khan (2021 SCMR 1270) but relied on the case of leave refusing order rendered in the case of Hamood Mehmood vs. Mst. Shabana Ishaq (2017 SCMR 2022) wherein the order to deposit the balance sale consideration was passed by consent. It was further contended that even if the direction, if any, given by the court for deposit of balance sale consideration is not complied with, the law does not stipulate penal consequences and at best, an injunctive order may be vacated, but not the dismissal of suit. It was further averred that the appellant had complied with the directions to deposit the balance sale consideration in view of the directions given by the Appellate Court. It was further contended that neither the evidence adduced by the appellant was challenged during cross-examination nor the respondents led any evidence. He further argued that after the receipt of the substantial sale consideration, physical peaceful vacant possession was handed over to the appellant who, throughout the proceedings, was ready and willing to pay the balance sale consideration, which is evident from the judgment passed by the Appellate Court. He concluded that the impugned judgment suffers from serious legal infirmities, misreading, and non-reading of the material on record.

4. The learned counsel for the legal heirs of respondent No.1 fully supported the impugned judgment of the High Court and argued that

the findings recorded by the Appellate Court were not in consonance with the evidence and the conclusion drawn in the appellate judgment was misconceived as it failed to take into consideration various important aspects involved in the case. He further argued that the suit was not maintainable under Section 7 of the Transfer of Property Act, 1882. It was further contended that the appellant failed to produce a single receipt showing any part payment. It was further averred that the suit of the appellant was barred under Section 21 of the Specific Relief Act, 1877, and the agreement dated 31.10.2009 was not enforceable under the law, and this crucial aspect was ignored by the appellate Court and its errors were rectified by the High Court in the impugned judgment.

5. Heard the arguments. The main ground for dismissing the suit of the appellant by the High Court was that he did not deposit the balance sale consideration in Court at the time of institution of the Suit or on the date of first appearances, nor did he file any application before the Trial Court for seeking permission to deposit the balance amount in Court. The High Court, while dismissing the suit, relied upon the judgment rendered by this Court in the case of Hamood Mehmood vs. Mst. Shabana Ishaq (2017 SCMR 2022), wherein it was held that it is mandatory for the person, who seeks enforcement of an agreement under the Specific Relief Act, that on the first appearance before the Court or on the date of Institution of the Suit, he shall apply to the Court for permission to deposit the balance amount, and any contumacious/omission in this regard would entail in dismissal of the Suit. Reliance was also placed on the judgments of this Court in the case of Allah Ditta vs. Beshir Ahmad (1997 SCMR 181), Messrs. Kuwait National Real Estate Company (Pvt.) Ltd. vs. Messrs. Educational Excellence Ltd. (2020 SCMR 171) and Haji Abdul Hameed Khan vs. Ghulam Rabbani (2003 SCMR 953).

6. To get hold of meticulous empathy and receptiveness, it is somewhat well-timed to thrash out and delve into the facts and ratio of the judgments of this Court, fortifying the dismissal of the suit for non-depositing the sale consideration in Court at the time of institution of the Suit or for non-applying the permission of the Court for such deposit immediately. The survey of the aforementioned judgments is unambiguously deduced as under: -

I. Hamood Mehmood vs. Shabana Ishaq (2017 SCMR 2022):

In this case, it was found mandatory for the person, whether plaintiff or defendant, seeking specific performance that he should on first appearance before the Court or on the day of institution of the suit, apply to the Court for 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. If we look into the facts of this case, there was no issue raised for non-deposit of the balance sale consideration at the time of institution of suit but the counsel for the plaintiff undertook to deposit the balance sale consideration within seven days from the date of the order. The counsel for the defendant No.1 had no objection so the Court directed to deposit balance sale consideration within seven days with the caution that no further time will be granted and if the said is not accomplished within seven days the status quo order granted on 07.03.2017 will automatically be vacated and the defendant No.1 will be free to sell the said property to any third person, if he chooses to do so.

II. Allah Ditta vs. Beshir Ahmad (1997 SCMR 181):

In this case too, there was no issue of deposit of the balance sale consideration at the time of institution of the suit but the appellant accepted the condition that he would deposit the balance of the sale price by 25.06.1994 and in case of failure his suit may be dismissed. Both parties to the case were benefited by the consent order in one form or the other. As for the advantage accruing to the petitioner, he got extension in time for deposit of amount which, as fixed by the Trial Court, had expired and the stay order granted to him by the learned Trial Court had come to an end but in pursuance of consent order, the stay order again became available to him and it was to continue till the disposal of suit.

III. M/s. Kuwait National Real Estate Company (Pvt.) Ltd. vs. M/s. Educational Excellence Ltd. (2020 SCMR 171):

In this case yet again, there was no issue for the non-deposit of the amount on the first date or at the time of institution of suit but according to the facts, the petitioners denied that they refused to sell the shares to the respondent No. 1 and expressed willingness to fully implement the terms of the MoU subject to the depositing of pay

orders by respondent No. 1 for the entire sale consideration in Court immediately. Both the applications along with respondent No.1's stay application were fixed for hearing on 13.11.2018, when the Civil Judge directed respondent No.1 to deposit the purchase price in Court within 30 days, with a caution that in case he fails to comply, the suit shall be dismissed. Respondent No.1 failed to pay/deposit the purchase price, and in order to further avoid payment, filed a civil revision against the order dated 13.11.2018 and the Lahore High Court suspended the order of the Civil Judge subject to the depositing of the amount with the Deputy Registrar (Jud) of the High Court within three weeks and such suspension order was challenged in this Court. Finally, this Court held that there was no justification for the High Court for interfering with the order dated 13.11.2018 of the Civil Judge and converted this petition into an appeal and while setting aside the impugned order, restored the order dated 13.11.2018 passed by the learned Civil Judge and also restored the suit.

IV. Haji Abdul Hameed Khan vs. Ghulam Rabbani (2003 SCMR 953)

In this case as well, there was no issue of non-depositing the amount on the first date or at the time of institution but the Court observed that the conduct of the petitioner unequivocally tends to reflect that he has been protracting the litigation on one or the other ground and has been successful so far on untenable grounds. Since the petitioner did not deposit the sale amount in compliance with the Trial Court judgment as well as within the extended period, as permitted by the High Court, it was legitimately justified in presuming that the petitioner was not serious in the prosecution of his remedy and appeared to be rather unwilling to perform his part of contract. This ground alone was found sufficient by this Court to disentitle him to a decree for specific performance.

7. The case of Hamood Mehmood (*supra*) came into discussion and consideration in the case of Muhammad Asif Awan vs Dawood Khan and others (2021 SCMR 1270) in Civil Appeal decided on 27.04.2021 by a three-member bench of this Court in which, first of all, it was held that the case of Hamood Mehmood (*supra*) was a leave refusing order and cannot be held to be an enunciation of law by this Court.

In addition thereto, this Court in the above case, further held that the approach of the High Court that the non-compliance of the order directing the deposit would amount to failure on the part of the appellant to perform an act necessary to the further progress of the suit and therefore, would result in dismissal of the suit under Order XVII, Rule 3 of the Code of Civil Procedure, 1908 ("**C.P.C.**") appears to be totally misconceived. This Court further noted that the Order dated 15.07.2018 reflects that the matter was fixed for evidence of the plaintiff and the record did not show that further progress was not possible on account of non-production of plaintiff evidence. In the given circumstances, unless the appellant would have been put to notice that the non-deposit of the balance sale price would be deemed to be his incapability of performing his part of the contract as envisaged under section 24(b) of the Specific Relief Act rendering the contract non-enforceable, the suit could not have been dismissed. It was further held that the language employed in Order XVII, Rule 3, C.P.C. i.e., "the Court may, notwithstanding such default, proceed to decide the suit forthwith" is permissive and discretionary and does not in all circumstances entail penal consequences and the discretion exercised by the Trial Court by extending time for deposit of balance sale price *pendente lite* just for a few days in the face of denial of deal by the vendor was not perverse, entitling the High Court to interfere in its writ jurisdiction. It was also held that the order directing deposit of balance sale price did not stipulate the consequences for non-deposit which normally are the vacation of injunctive order or the dismissal of the suit, consequently, the order of the High Court non-suiting the appellant was set aside by this Court.

8. No doubt, the relief of specific performance of a contract is discretionary which cannot be exercised arbitrarily or unreasonably. There is also no skepticism that the person seeking specific performance should demonstrate that he is all set and passionate to perform his part of obligation but the other side is avoiding the performance. Appendix "A" of the First Schedule of the C.P.C. focuses on the specimen and modules of pleadings in which Form-47 relates to the "Suit for Specific Performance". According to paragraph (3), a specific condition required to be incorporated in the plaint is that "The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice". Initial burden lies on the plaintiff to show his willingness and

readiness unequivocally and while asserting for any injunctive relief or otherwise, during the pending adjudication, the plaintiff may offer to deposit the balance amount in Court and at the same, the Court has to consider bona fide of the plaintiff i.e., whether he is ready and willing to perform his part of the contract and if the plaintiff does not offer to deposit the balance sale consideration in Court, even then, the Court in order to determine and find out the seriousness or unseriousness or bona fide or mala fide of the plaintiff who lodged the claim of specific performance of contract, may pass the Order for depositing the amount in Court to protect the interest of the defendant as check and balance with a certain timeline for compliance of such order with adverse consequence on account of noncompliance within the stipulated time [Ref: M/s. DW Pakistan (Private) Limited versus Begum Anisa Fazl-i-Mahmood (2023 SCMR 555)]

9. The primary wisdom of the courts in directing the plaintiff in a suit for specific performance to deposit the sale consideration in Court in fact conveys that the plaintiff/vendee has the capacity to pay the sale consideration or balance sale consideration and is ready and willing to perform his obligations arising from the contract which is a condition precedent for claiming relief of specific performance but there is no mandatory provision under the Specific Relief Act wherein, come what may, the plaintiff has to tender the outstanding sale consideration in Court at the time of instituting or presenting the plaint or even at the time of admission of the suit by the Court before issuing summons to the defendant or defendants. So for all intent and practical purposes, the deposit of the sale consideration or balance sale consideration in the Court is not an automatic or precondition by fiction of law but there must be an order of the Court for deposit with certain timeline with repercussions of noncompliance, and in case of genuine and satisfactory grounds pleaded for noncompliance within the stipulated time, the Court, in exercise of powers conferred under Section 148, C.P.C., may extend and accord some reasonable time for compliance, with or without cost, if a justifiable and satisfactory case for extension is made out.

10. At one fell swoop, a ground reality cannot be lost sight of that much debate is made on the effect and outcome of non-depositing the balance sale consideration in the Court with or without order of the

Court or noncompliance of the order of the Court, but we cannot ignore that despite depositing the amount in Court, it is a matter of fact that several number of years are consumed to decide civil suits for specific performance of contract by the Civil Courts, specially relating to immovable properties (residential, commercial and industrial) at original side, and after decision, the remedies of appeals and revision are inaugurated and ultimately the litigation is concluded in this Court, and by that time, much water seems to have been flown under the bridge which creates serious frustration for both sides and, not only the amount deposited in Court but also the property, both remain blocked for a considerable time. In the intervening period, if the performance of contract relates to the immovable property, the value of contractual price increases manifold which may not be found commensurate to the price deposited in Court despite adding to the profit on it if the amount ordered to be invested by the Court envisages some profitable scheme. So, in order to overcome such eventualities, what may the Court do? The first provision which may be invoked is provided under Order X, Rule 1, C.P.C., in which, at the first hearing of the suit, the Court can ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement and can also record such admissions and denials and the substance of the examination shall be reduced to writing by the Judge, and shall form part of the record. Perhaps better sense will prevail upon the parties to resolve and settle the dispute at an early stage but if this provision is not worked out, then the Court may also persuade the parties to adopt the method of alternate dispute resolution and maybe, after proper mediation, they will patch up the dispute or issues cropped up between them which result in such time consuming litigation in the courts. At last, if no progress is made or the dispute is not mediated or resolved, then obviously the matter will revert back to the Court and for an early decision, the Court may expedite the settlement of issues and recording of evidence either in the Court or on an application of the plaintiff or defendant, or by consent of the parties, may appoint a Commission with strict directions to complete the task of recording evidence religiously within the stipulated time frame which will ease and facilitate an early disposal of such matters. Some cases are related to the high stakes of commercial and industrial ventures and consortiums, where

the public interest is also involved, therefore, the Courts ought to make some positive efforts with a dynamic and proactive approach to decide such category of cases on priority. In the case of Imtiaz Ahmad vs. Ghulam Ali (PLD 1963 S.C.382), this Court held that the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy. Any system which, by giving effect to the form and not to the substance, defeats substantive rights, is defective to that extent. The ideal must always be a system that gives to every person what is his. According to annotation from the book, Judicial Reflections of Justice Bhagwati (2008 Edition), the judiciary has to devise new methods, forge new tools and innovate new strategies for the purpose of reaching social justice to the common man. It must abjure reactive approach and adopt a proactive role. It must respond to the demands and urges of the large masses of people for social justice, and by adopting a creative and activist approach, it must mould and develop the law and bring it closer to the people so that the rule of law becomes meaningful and social justice a reality for them. Today, a vast revolution is taking place in the judicial process; the theatre of law is fast-changing and the problems of the poor are coming to the forefront. The Court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning.

11. Reverting back to the present issue, the learned High Court in Second Appeal, without adverting to the other grounds raised by the contesting respondents to challenge the judgment and decree of the first Appellate Court, nonsuited the appellant on the sole ground that he failed to deposit the outstanding sale consideration at the time of institution of the suit and/or failed to apply the Court for seeking directions for deposit of such amount, but by doing so, the Court ignored a crucial aspect of the case that while allowing the appeal and decreeing the suit by the first Appellate Court, directions were also issued to the appellant to deposit the amount within a stipulated timeframe and according to the appellant such amount was already deposited in terms of directions contained in the appellate judgment with consequence of non-compliance.

12. The function of the courts is to do substantial justice between the parties after providing ample opportunity of hearing, which is one of the significant components and virtue of fair trial. What we have perceived is that the learned High Court neither converged any substantial question of law, nor appreciated the evidence and findings recorded by the first Appellate Court which decreed the suit, nor pointed out any defect in the judgment within the parameters and confines of the right of Second Appeal provided under Section 100, C.P.C., which can only be preferred against a decree passed in appeal on the grounds such as (a) the decision being contrary to law or to some usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law, or (c) a substantial error or defect in the procedure provided by the C.P.C., or by any other law for the time being in force, which may possibly have produced an error or defect in the decision of the case upon merits; and according to Section 101, C.P.C., no second appeal shall lie except on the grounds mentioned in Section 100. The High Court under the sphere of Section 100, C.P.C., can take cognizance of a substantial question of law rather than triggering interference on a pure question of fact. The Court should also formulate the question of law to meet the requirements of Order XLI, Rule 31, C.P.C. The right of appeal accentuates twofold and threefold checks and balances to prevent injustice, and ensures that justice has been done with a noticeable differentiation between the two appellate jurisdictions; one is conferred by Section 96, C.P.C., in which the Appellate Court may embark upon the questions of fact, while in the second appeal provided under Section 100, the High Court cannot interfere with the findings of fact recorded by the first Appellate Court, rather the jurisdiction is relatively delineated to the questions of law which is *sine qua non* for exercising the jurisdiction under Section 100, C.P.C., but in this case, the learned High Court only adverted to a non-issue in a hyper-technical manner without realizing that the amount was already deposited in view of the directions contained in the appellate judgment and instead of considering the actual grounds of appeal raised by the contesting respondents which may have a colossal weightiness and significance for challenging the appellate judgment, the High Court only embarked upon the controversy which had little value and no consequence at a much belated stage of proceedings; in fact, no such ground was even raised in the memo of second appeal filed under Section 100, C.P.C., by the appellant.

13. This Civil Appeal was fixed for hearing on 04.04.2024 when it was allowed *vide* our short order, and as a consequence whereof, the impugned judgment of the Sindh High Court dated 22.02.2021 was set aside and the matter was remanded for deciding the second appeal afresh after providing an opportunity of hearing to the parties. Above are the reasons assigned in support of our short order.

Judge

Judge

KARACHI
04.04.2024
Khalid
Approved for reporting