

51/23

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE AMIN-UD-DIN KHAN

MR. JUSTICE SYED HASAN AZHAR RIZVI

C.A. No. 781 OF 2017

*Against the judgment dated 31.10.2016 passed
by the Lahore High Court, Lahore in RSA No. 93
of 2011.*

Muhammad Aslam etc.

....Appellants

Versus

Muhammad Anwar

....Respondent

For the appellants:

Sh. Usman Karim ud Din, ASC.

For the respondent:

Mr. Iftikhar Ahmed Chaudhary, ASC.

Date of Hearing:

04.05.2023

ORDER

AMIN-UD-DIN KHAN, J:- In this matter leave was
granted on 17.5.2017. Leave granting order is reproduced:-

"Contents, inter alia, that where a date was stipulated in the agreement for performance of the act agreed and so was the consequence of its failure, time, for all legal and practical purposes was of essence of the contract; that the respondent having failed to perform his part within the stipulated time could not ask for enforcement of the contract and that if such date is not considered as terminus ad quam then no transaction would attain finality in the mundane existence of the parties.

2. Points raised need consideration. We, therefore, grant leave in this case to consider the same. Let the appeal be prepared on the available record with the liberty to the parties to add thereto.

3. CMA No. 3463-L of 2016:- As we have granted leave in this case, this CMA is allowed and the operation of the impugned judgment is suspended till final disposal of the appeal."

Plaintiff-respondent Muhammad Anwar on 06.01.1999 filed a suit for specific performance against the defendants-appellants on the basis of an agreement to sell dated 27.2.1997 with regard to the suit property, fully described in para Nos. 1 and 2 of the plaint, by the

predecessor of the defendants-appellants namely Ghulam Muhammad. The date of performance was 27.8.1997. The suit property was 4 kanals for a consideration of Rs:5,70,000/- and earnest money of Rs:1,50,000/- was paid at the time of agreement and rest of the amount was to be paid at the time of performance/transfer of the suit property through sale or in the alternate through suit for specific performance. In the suit, it is pleaded that said Ghulam Muhammad died before the date for performance of agreement mentioned in the agreement to sell. It is further pleaded that when legal heirs of the vendor were contacted and a legal notice was given to them for performance of agreement, they offered another plot of the same size but away from the main road of lesser value, therefore, the suit. The suit was filed without payment of court fee as it is pleaded that same is exempt under the orders of the Federal Shariat Court despite the fact that value for the purposes of jurisdiction and court fee was Rs:5,70,000/-. In the written statement, the agreement was admitted by the defendants by their predecessor in favour of the plaintiff. It was stated that as per the terms of agreement if the vendee was unable to pay the remaining consideration amount the agreement to sell will be cancelled and the earnest money i.e. Rs:1,50,000/- will be forfeited in favour of the vendor. It is further pleaded that many a times after date of performance the plaintiff was asked to pay the consideration amount but he failed as he was having no money and this suit has been filed malafidely and he is not entitled for a decree of specific performance. The learned trial court was pleased to frame the issues, invited the parties to produce their respective evidence. Both the parties produced their oral as well as documentary evidence. After conclusion of trial, the learned trial court was pleased to decree the

suit vide judgment and decree dated 2.6.2010 and an order for payment of remaining consideration amount within 30 days was made. The appeal filed before the learned first appellate court was dismissed by the learned ADJ vide judgment and decree dated 12.2.2011. The second appeal filed by the appellants was also dismissed vide judgment and decree dated 31.10.2016. Hence, this appeal with the leave of the court.

2. We have heard the learned counsel for the parties at length. It is admitted position that the original vendor namely Ghulam Muhammad passed away on 17.2.1998 long after the date for performance mentioned in the agreement. PW-1 who is witness to the agreement stated that on the fixed date for performance the plaintiff Muhammad Anwar was having no money, therefore, he got two months time from the vendor. The extension of time was oral. Thereafter further one month's time was given on the request of Muhammad Anwar. Thereafter, when Muhammad Anwar arranged the money, Ghulam Muhammad was ill due to paralysis, therefore, the document of sale could not be registered and thereafter the vendor Ghulam Muhammad passed away. All these assertions are beyond the pleadings, same is the position of PW-2 Haji Agha Muhammad Tufail, who is other marginal witness of agreement to sell Exh.P.1, he admitted that if on the date of performance the vendee will not be able to pay the remaining consideration amount the agreement will be cancelled. Further stated that the vendor agreed that he will give a thoroughfare to reach the road from the suit land. He admitted date of death of Ghulam Muhammad as 17.02.1998. Plaintiff, who appeared as PW-4, stated in his statement before the Court that on the date of performance I could not arrange the payment of remaining consideration amount, therefore, I met the

dealer for enhancement of time for performance, who brought the plaintiff to the vendor and two months' time was extended, thereafter, another one month time was extended. It is further stated that thereafter I arranged remaining consideration amount and due to paralysis the vendor was unable to perform his part of contract for registration of the sale deed. It is stated that after 15/20 days the vendor passed away. All these statements are in contradiction with the pleadings as it is pleaded that before the date of performance the vendor passed away whereas in evidence not only plaintiff himself is contradicting his pleadings, his witnesses are also contradicting the stance. It is admitted by the plaintiff-vendee that on the date of performance he was unable to arrange the remaining consideration amount and it is admitted position that as per the agreement if the vendee was unable to perform his part of contract i.e. payment of remaining consideration amount which was near about 70% of the agreed amount as near about 30% was paid as earnest money, therefore, agreement was to be cancelled and when the plaintiff has led evidence beyond the pleadings, therefore, the case law cited by the learned counsel for the appellants reported as "Muhammad Nawaz alias Nawaza and others versus Member Judicial Board of Revenue and others" (2014 SCMR 914), "Sardar Muhammad Naseem Khan versus Returning Officer, PP-12 and others" (2015 SCMR 1698), "Binyameen and 3 others versus Chaudhry Hakim and another" (1996 SCMR 336), "Province of Punjab through Chief Secretary and 5 others versus Malik Ibrahim and Sons and another" (2000 SCMR 1172) and "Sultan Muhammad and another versus Muhammad Qasim and others" (2010 SCMR 1630) supports the version of the appellants that the plaintiff-respondent cannot lead evidence beyond the pleadings and further the evidence led even negates the version of the

plaintiff-respondent pleaded through the plaint. It is clear and admitted position on the record that the vendor passed away on 17.2.1998 long after the date for performance of the contract which was 27.08.1997 and the case pleaded that the vendor passed away before the date for performance is not only wrong but dishonestly pleaded to show that it was the defendants legal heirs of the vendor who could not get the mutation of inheritance in their favour, therefore, it was default of the legal heirs of the vendor/defendants. All the fora below have ignored this important legal position and even ignored to consider the pleadings of the parties and the evidence of the plaintiff, as plaintiff was required to show that he was willing and ready to perform his part of contract on the target date and it was default of the vendor/defendant or his legal heirs due to which the performance could not be materialized, therefore, they were forced to file a suit for specific performance. Circumstances show that the suit was decreed after about 13 years of arriving at the agreement to sell, the plaintiff-respondent paid the remaining consideration amount i.e. Rs:4,20,000/- after passing of the decree by the learned trial court dated 2.6.2010. In these circumstances, the judgments and decrees passed by all the courts below ignoring the fact that the terms of the agreement show that time was essence of the contract when it was specifically mentioned the date for performance and its consequences for non-performance by the plaintiff-vendee and it will be cancelled and earnest money will be confiscated. Plaintiff admitted that he could not arrange the remaining consideration amount even on the date of performance and even three months thereafter and further dishonestly it is pleaded that plaintiff approached the legal heirs of vendor as he passed away before the date of performance which is factually incorrect whereas his own evidence as well as evidence of

his witnesses contradict his pleadings. In this case time was essence of contract, the consequence was to be in accordance with the agreement but all the courts below have ignored this fact and further when fault was with the vendee-plaintiff he was absolutely not entitled for the discretionary relief in the shape of a decree for specific performance. In this view of the matter, this appeal is allowed. The judgments and decrees passed by the three fora below are set aside. The result is that suit filed by the plaintiff-respondent stands dismissed with costs. The earnest money will be confiscated in favour of the appellants in accordance with the agreement. The remaining consideration amount deposited by the plaintiff/deed-holder under the orders of the court, with the trial court will be received back by him.

Islamabad, the
4th May, 2023
(Mazhar Javed Bhatti)

APPROVED FOR REPORTING