

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT

Mr. Justice Maqbool Baqar
Mr. Justice Qazi Muhammad Amin Ahmed

(AFR)

Civil Appeal No. 601/2019 & CMA No. 2953/2019

(Against the judgment dated 13.02.2019 of the Lahore High Court, Lahore passed in RSA No. 42077/2017)

Mst. Noor Jehan & another

Appellate(s)

Versus

Saleem Shahadat

Respondent(s)

For the Appellate(s) : Syed Najamul Hassan Kazmi, ASC
For the Respondent(s) : Maulvi Anwar-ul-Haq, ASC
Date of Hearing : 18.11.2021

ORDER

Maqbool Baqar, J. A suit filed by the respondents for specific performance of an agreement for sale of an immoveable property was dismissed by the Trial Court, so was the first appeal against such dismissal. The Lahore High Court through the impugned judgment however allowed the respondents' second appeal and set aside the said two concurrent judgments.

2. The respondents' case as set out before the Trial Court was that on 23.04.2004, the appellants who are the owners of a property, being Bungalow No. 10, Plot No. 14 measuring 1318.50 sq yards, Shami Road, Lahore Cantt ("the suit property), in terms of an agreement, titled "token receipt", agreed to sell the suit property to the respondent for a sale consideration of Rs. 2,30,00,000/-. Receipt of Rs. 5,00,000/- paid by the respondents to the appellants by way

of earnest money on the said date i.e. 23.04.2004, was duly acknowledged by the appellants through the said "token receipt". The balance sale consideration amount, as stipulated in the "token receipt", was to be paid in three instalments as follows:

- (i) Rs. 35,00,000/-, on 26.04.2004, on which date a formal agreement to sell was to be executed between the parties;
- (ii) Rs. 25,00,000/- within six weeks from 23.04.2004;
- (iii) Rs. 1,65,00,000/- within 13 weeks from 23.04.2004.

3. The "token receipt", according to the respondent, was duly signed by the appellants and the respondent, and also by the witnesses of the execution thereof, and of the payment acknowledged therein, namely, Muhammad Ashraf and Liaquat Khokhar, respectively, who also were the estate agents through whom the deal was made. However, when the respondents requested the appellants to execute a formal agreement to sell, the appellants asked the respondents to pay Rs. 40,00,000/- instead of Rs. 35,00,000/- as agreed to be then paid in terms of the "token receipt". The respondents thus obtained a pay order in the sum of Rs. 40,00,000/-, bearing No. 0402186521 dated 24.04.2004, drawn on Picic Commercial Bank Limited, Gulberg Lahore, and also purchased a stamp paper of Rs. 100/- for drawing a formal agreement to sell, but when on 26.04.2004, the respondents approached the appellants for execution of the document, the appellants refused to execute the same, and instead told the respondent that they shall sell the suit property to some other party at a higher price. Through a legal notice dated 29.04.2004 served

by the respondents through his counsel, the respondents called upon the appellants to honour the agreement, but to no avail.

4. Through their written statement the appellants denied that there has been any agreement to sell between the parties. It was averred that only verbal negotiations, through a property dealer, Muhammad Ashraf were held for the sale of the suit property, but no written agreement was executed and signed by the appellants. Although receipt of token amount of Rs.5,00,000/- was admitted, but it was claimed that the same was paid by Muhammad Ashraf and not the respondent. It was further claimed that the "token receipt" acknowledging such payment was not signed by the respondent and his signatures appearing on the photocopy of the said receipt, annexed to the plaint have been appended subsequently. It was averred that the appellants were to execute a formal agreement to sell, which was to contain the terms of sale, but was subject to payment of an instalment of Rs.35,00,000/- on 26.04.2004. The appellants further claimed that they did not know as to whether or not any pay order was prepared as the same was never delivered to them, rather the property dealer, Muhammad Ashraf, has asked for extension in time, as according to him, the buyer he was representing, has not been able to arrange the amount, which request was declined. It was denied that Muhammad Ashraf contacted the appellants, and claimed that in fact it were the appellants, who on 26.04.2004 contacted and requested Muhammad Ashraf for payment of the instalment of Rs. 35,00,000/-. However, after two days Muhammad Ashraf contacted the defendants and requested for refund of the

token amount as, according to him, his client was not able to arrange further payment. It was denied that the appellants requested for enhancement in the amount of instalment from Rs.35,00,000/- to Rs.40,00,000/-.

5. The respondent in his evidence before the Trial Court deposed that he negotiated the deal for the purchase of the suit property with the appellants through Ashraf Estate property dealers, and after long drawn negotiations, he along with the property dealers, Muhammad Ashraf and Liaquat Khokhar, on 23.4.2004 at 6 pm, went to the residence of the appellants, being the suit property, where the deal was struck for a price of Rs. 2.3 million, and he then paid to the appellant a token amount of Rs.5,00,000/-, in presence of Muhammad Ashraf and Liaquat Khokhar. The respondent also stated the manner in which the balance sale consideration amount was to be paid in three instalments, as is stipulated in the "token receipt", and produced a photocopy of the "token receipt", as the original thereof has been lost. The token receipt was exhibited, Ex-P-1. He also explained as to how and why he got prepared a pay order of Rs.40,00,000/- instead of Rs. 35,00,000/-, as explained in the plaint, and noted hereinbefore. The respondent further deposed that he also purchased a stamp paper for drawing a formal agreement to sell, and on 26.04.2004 he along with Muhammad Ashraf visited the appellants at their residence, however, the appellants refused to receive the pay order and told them that they have received a higher offer.

6. Muhammad Ashraf appeared as PW-2 and deposed that he is engaged in the property business under the name of Ashraf Estate since 1976, and that the appellants have requested him to sell the suit property, whereas the respondent who was his client wanted to purchase a house of about 2½ kanals in the cantonment area, and after seeing a number of houses through him, the respondent showed his interest in buying the suit property. The witness thereafter narrated the details of the meeting arranged by him between the appellants and the respondent on 23.4.2004, where the deal for the suit property was made between the parties before him and his partner Liaquat Khokhar, and the respondent paid to the appellants an amount of Rs. 500,000/- by way of earnest money. He deposed that the "Token receipt" Ex P-1 was signed by the appellants and the respondent, before him and Liaquat Khokhar, and that he and Liaquat Khokhar also signed the document as witnesses thereto. However on 24.4.2004, the appellants called him on telephone and asked for a pay order of Rs.40,00,000/- instead of the agreed amount of Rs. 35,00,000/-, as they were in need of that much amount. The respondent thus obtained a pay order of Rs.40,00,000/-, but when they went to the appellants to deliver the pay order, the appellants refused to accept the same and demanded increase in the price as according to them they had received a higher offer. The appellants, according to the witness, despite persuasion remained adamant, and declined to honour the agreement.

7. Liaquat Khokhar, PW-3, deposed that he is a property dealer and has been working in partnership with Muhammad Ashraf for the last 21 years. According to him at the time of the agreement in

April 2004, the parties, being the appellants and the respondent, were present, the witness verified his signatures and that of Muhammad Ashraf appended on the token receipt, as witnesses thereof. He further deposed that the document was signed by the appellants and the respondent in his presence and that he and Muhammad Ashraf have facilitated the deal as Estate agents. He also deposed that at the time of the agreement, the respondent has paid Rs.500,000/- to the appellants. He explained the purported circumstances under which the pay order of Rs.40,00,000/- was obtained by the respondent. The witnesses claimed that

”ہم مورخہ 26-04-2004 مدعایان کے گھر وہ ہے آرڈر لے کر چلے گئے۔“

and offered them the pay order, but the appellants declined to accept it, and refused to honour the agreement, and said that they (the appellants) have received a higher offer. However, during his cross examination he contradicted himself and stated that it were the respondent and Muhammad Ashraf who went to deliver the pay order. He made a further contradiction when he stated that it was on 23.04.2004 that they last went to the appellants.

8. Though appellant No.2 Asifa Bano (DW-1), during her evidence denied having agreed to sell the suit property, but admitted having received the token amount. She stated that the "token receipt" was signed by her and her sister, the appellant No.1, and by Muhammad Ashraf and Liaquat Khokhar, but was not signed by anyone else before them. She further deposed that as per the "token receipt" the agreed sale consideration amount was Rs.2,30,00,000/- She claimed that the token amount was paid by Muhammad Ashraf,

but also said that Muhammad Ashraf and Liaquat Khokhar were property dealers. The appellant No. 2 further deposed that since no further payment was made, they asked for the payment due, but were told that the amount could not be arranged. She stated that she has never seen the respondent and claimed they never entered into any agreement with the respondent. During her cross examination, she disclosed that she is a matriculate and can read Urdu. She admitted her signature and that of her sister, the appellant No.1, on the token receipt, Ex.P-1, and that they signed the document at their own volition. She admitted that they accepted the token money, as they agreed to sell the suit property, and that they had read the contents of the "token receipt" before signing it. She also admitted that the name of the respondent is mentioned in the "token receipt". Appellant No.2 further admitted that the property was not being purchased by Muhammad Ashraf himself. She did not deny the suggestion that as per the token receipt, Ex.P-1, the respondent was obliged to pay Rs.35,00,000/- within 6 weeks, and also to pay to them Rs.1,65,000/- within 13 weeks. She refused to respond to the suggestion that had the respondent paid to them the agreed sale consideration amount they would have conveyed the suit property in favour of the respondent, but voluntarily said that Ashraf did not proceed in the matter further. The witness also did not deny the suggestion that, as per the token receipt, the agreement to sell the suit property was between the appellants and the respondent, but said that the appellant neither meet nor had seen the respondent.

9. The position that now emerges from the foregoing is that the respondent through his evidence, and that of his witnesses, Muhammad Ashraf and Liaquat Khokhar, has proved the execution of the document described as "Token Receipt", and has likewise also proved the payment of the token amount to the appellants.

10. On the other hand, the appellants also have admitted the execution of the "Token Receipt". The appellant No. 2, who is the only witness examined on behalf of the appellants, admitted that the "Token Receipt" was written at her residence, and that she has read it before she and her sister the appellant No.1, signed the same. She disclosed that she is a matriculate and can read Urdu, and further that they, the appellants, have signed the document at their own volition. She admitted that as per the 'Token Receipt' the agreed sale consideration amount was 2.3 million. She also admitted having received the token amount of Rs. 5,00,000/- ,but claimed that the same was paid by Muhammad Ashraf, whom she described as a property dealer. She also admitted that the name of the respondent is mentioned in the token receipt and further that the property was not being purchased by Muhammad Ashraf himself. The appellant No. 1, did not deny the suggestion that as per the token receipt, Ex.P-1, the respondent was obliged to pay Rs. 3.5 million on 26.4.2004; Rs.2.5 million within 6 weeks, and Rs.10.65 million within 13 weeks. She refused to respond to the suggestion that in the event the respondent would have paid the sale consideration amount the appellants would have conveyed the suit property in favour of the respondent. She also did not deny the suggestion that

in terms of the "token receipt", the agreement to sell the suit property was between the appellants and the respondent. She however said that the token receipt was not signed by the respondent before them and the signatures appearing thereon were appended subsequently.

11. It can therefore be seen that not only the execution of the "token receipt" was admitted by the appellants, but so also were admitted its contents, as well as the receipt of the payment acknowledged thereby. The appellants did not deny that in terms of the "token receipt", the balance sale consideration amount was to be paid to them in three instalments as noted herein before, and further that the receipt also contained the name of the respondent. So not only the execution of the "token receipt" between the appellants and the respondent, the contents thereof and the payment acknowledged thereby, were proved by the respondent through his evidence and that of the marginal witness of the document, but all the above has been admitted by the appellants as well. Indeed, the appellants have claimed that the signature of the respondent has been made on the "token receipt" subsequently, they have however not been able to support this claim in any manner.

12. The document titled "token receipt" contains all the necessary ingredients essential for it to qualify as a valid and lawfully enforceable contract. The document unambiguously contains the identity of the seller and the purchaser. The property to be sold has been described accurately in a well defined manner. It spells out

the agreed sale consideration amount, and stipulates the manner of payment thereof. The parties who executed the document are at consensus in idem. The document clearly manifests the intention of the appellants to sell and that of the respondent to purchase the subject property. Nothing crucial was left to be settled which could have adversely affected the validity of the contract. The specific performance of the document in the circumstances could not have been avoided on the pretext that it provided for executing a formal agreement. The "token receipt" was in itself a complete, and a lawfully enforceable agreement to sell. The judgment in the case of *Sheikh Akhtar Aziz vs. Mst. Shabnam Begum and others*, (2019 SCMR 524) may be referred to in this regard.

13. However the respondent has not been able to prove that he tendered to the appellants the payment due, as in the first place neither has he been able to prove that he in fact obtained the pay order, or that he offered the same to the appellants. Neither has the respondent produced the original pay order in his evidence as required in terms of Article 75 of Qanun-e-Shahadat Order, nor has he laid before the Court any other evidence, or material that he in fact obtained the pay order from the bank as claimed, and/or that the same was lost or destroyed, though it was imperative for the respondent to have proved the loss of the original, as an essential prerequisite for seeking to produce a photocopy of the pay order. The respondent also did not even move an application for permission to produce and exhibit a photostat copy of the pay order before the Court. He also did not bother to explain, as to when, how and under what circumstances

the pay order was lost, destroyed or misplaced. The respondent could have summoned the relevant record and the concerned officer from the payer bank which he choose not to. He has also not even claimed having lodged any complaint or FIR regarding the loss or theft of the pay order. The document was thus rightly not exhibited. The following judgments may be referred to in this regard, *State Life Insurance Corporation of Pakistan and another vs. Javaid Iqbal* (2011 SCMR 1013) and *Imam Din and 4 others vs. Bashir Ahmed and 10 others* (PLD 2005 Supreme Court 418).

14. It hardly needs any emphasis to convey that a document which has not been lawfully produced and exhibited in the Court is not worthy of being considered as evidence/proof of a fact. Even otherwise the respondent's evidence with regard to his tendering the pay order to the appellants does not sound credible. On the one hand he claims to have visited the appellants with Muhammad Ashraf and offered them the pay order on 26.4.2004, whereas on the other his witness Liaquat Khokhar's narration in that regard conveys that it was not just the respondent and Muhammad Ashraf who went to the appellants to deliver the pay order to the appellants but he too accompanied them, and it was in his presence that the pay order was offered and the appellants refused to accept it; in fact this witness gave a detailed account as to what transpired on that occasion on 26.4.2004. A further damage was caused to the credibility of the whole story regarding the pay order, when Liaquate Khokhar further contradicted the respondent, and contradicted himself also; and stated that it was on 23.4.2004 that they last went to the appellants' house.

15. In the circumstances discussed above, we are of the firm view that the respondent has failed to prove that he honoured his commitment and fulfilled his obligation under the "token receipt", and has, in fact, failed to tender the payment of the very first instalment that he was required to in terms of the "token receipt". Even otherwise, it is now well settled that where the vendor refuses to accept the sale consideration amount, the vendee seeking specific performance of the agreement to sell is essentially required to deposit the amount in the Court. The vendee has to demonstrate that he is and has at all relevant times been ready and willing to pay the amount, and to show the availability of the amount with him. A vendee cannot seek enforcement of reciprocal obligations of the vendor, unless he is able to demonstrate, not only his willingness, but also his capability to fulfil his obligation under the contract. Reliance may well be placed on the following judgments in this regard; *Muhammad Jamil and others v. Muhammad Arif* (2021 SCMR 1108), *Muhammad Yousaf v. Allah Ditta* (2021 SCMR 1241), *Muhammad Yaqub v. Muhammad Nasrullah Khan and others* (PLD 1986 SC 497), *Hamood Mehmood v. Mst. Shabana Ishaque and others* (2017 SCMR 2022), *Inayatullah Khan and others v. Shabir Ahmad Khan* (2021 SCMR 686), *M/s Kuwait National Real Estate Company (Pvt.) Ltd. and others v. M/s Educational Excellence Ltd., and another* (2020 SCMR 171), and *Muhammad Shafiq Ullah and others v. Allah Bakhsh (decd.) through LRs and others* (2021 SCMR 763).

16. However, in the instant case, not only the respondent failed in proving that he tendered the payment due, but also did not deposit the balance sale consideration, or even the amount due at the time of filing of his suit for specific performance in May, 2004, and obtained an injunctive order, without depositing any amount. The respondent, as can be seen from the Trial Court's order dated 07.07.2004, in terms whereof the injunctive order was confirmed, rather resisted the request/prayer for an order directing the respondent to deposit the balance sale consideration made by the appellants through their reply to the former's injunction application. Such was done on the flimsy ground that the respondent cannot be burdened with the deposit of the amount as the subject property was in possession of the appellants.

17. The respondent thus enjoyed the benefit of the injunctive order so obtained by him till the time the suit was dismissed for want of evidence, which dismissal he ultimately challenged before the Lahore High Court through RFA No.134 of 2010, where on 17.02.2010, through an application, bearing No.1-C/2010, he obtained an order restraining the appellants from alienating or encumbering the suit property, but this time the order was subject to deposit, of Rs.11.25 million, being fifty percent (50%) of the balance sale consideration amount within three weeks thereof, so that it may be invested in some profit bearing scheme. The order further provided that in case the amount is not deposited within the time prescribed thereby, the interim order shall stand vacated. However the respondent still failed to deposit the amount, and instead made an application, being CM No. 2-C/2010, that the

amount be allowed to be deposited by some Faisal Younas, and also to be invested in the name of said depositor, so that in the event of the amount being refunded, it may be refunded to Faisal Younas, and in case of his demise to his legal heirs, and none else.

18. It is not only the above request/prayer made by the respondent, but also the other contents of his application, that clearly show that the respondent never had the money to pay or to deposit as required of him. As the application stated that the respondent "was to pay the balance amount from sale of his own house, whereafter he would have shifted to the purchased house under the agreement but presently there is no house to move into". It is also relevant to note here that neither the agreement/token receipt provided for delivery of possession of the suit property to the respondent before payment of the entire sale consideration amount, and/or transfer of the property in his favour, nor has he ever pleaded that he had any such understanding/arrangement with the appellants. It is interesting to note that the respondent neither disclosed any particulars, or the value of the property that he claimed, he would have sold, nor submitted any document pertaining thereto. The respondent's request for deposit of the sale consideration amount in the name of the depositor Faisal Younas, and in a manner that in the event of its being refunded, it be refunded to Faisal Younas, and in case of his demise to his legal heirs, and none else, leaves one wondering, as to under what arrangement the said depositor agreed to deposit the amount, and as to how and in what manner he secured his amount and/or interest in the matter, in case of the suit property being ordered to

be conveyed to the respondent; as a person who was not ready to rely upon the respondent for refund of his money and had deposited the amount under an order securing its refund to him only, as noted above, can hardly be expected to leave his money or interest in the matter unprotected and insecure in such an event. However, the respondent's application was allowed and the amount was thus deposited in the Court on 28.2.2019.

19. In the facts and circumstances of the case as discussed hereinbefore, there remains no doubt that the respondent has not only failed to tender the sale consideration amount due to the appellants, but has also failed/avoided to deposit the amount in Court as of required of him. The respondent was therefore not entitled to the discretionary relief of specific performance sought by him. The appeal is accordingly allowed and the impugned judgment is set aside. The appellants shall within a month from the date hereof refund to the respondent the token amount/earnest money paid by him to them under the "token receipt". CMA No. 2953/2019 stands disposed of.

Announced in open Court on 01-03-2022
at Islamabad

'APPROVED FOR REPORTING'
Rizwan