

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

**MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE SAJJAD ALI SHAH
MR. JUSTICE MUNIB AKHTAR**

AFR
Civil Appeal No. 1767 of 2019.
(Against the order dated 19.2.2019 passed by the
Lahore High Court in W.P. No.243 of 2019)

Muhammad Asif Awan

Appellant

Versus

Dawood Khan, etc.

Respondent

For the Appellant (s) : Mr. Muhammad Munir Paracha, ASC.

For the Respondent(s): : Mr. Mushtaq Ahmed Mohal, ASC

Date of Hearing : 27.04.2021

ORDER

Sajjad Ali Shah, J.- The appellant has challenged the verdict of the Lahore High Court whereby he was non-suited by accepting the respondent's writ petition leading to setting aside the order of the Additional District Judge Lahore refusing to interfere with the order of the trial Court extending the time for depositing the balance sale consideration.

2. Briefly, the appellant claimed to have entered into an agreement with the respondent on 19.11.2013 for the purchase of 7 acres, 7 marlas land against sale price of Rs.27,00,000/- per acre and consequently paid a sum of Rs.10,00,000/- to the respondent as token money. It has been claimed that upon failure of the respondent to perform his part of the agreement, the

appellant on 28.11.2014 filed a suit claiming specific performance of the said agreement. The respondent after having been served, filed his written statement, denied the execution of the alleged sale agreement and claimed the same to be forged, false, fictitious, bogus and fraudulent. It appears that the respondent during pendency of the suit moved an application seeking an order from the trial Court directing the appellant to deposit the entire sale consideration by asserting that it was mandatory for a party claiming specific performance of an agreement under the Specific Relief Act, 1877 to deposit the balance sale consideration on his first appearance in Court. The appellant responded to the application by showing his willingness to deposit the balance sale price in case the respondent admits the sale. It appears that after hearing the parties, the trial Court vide its order dated 15.7.2018 directed the appellant to deposit the balance sale price on or before 6.9.2018 just to show his *bona fide*. The appellant questioned the order before the District Judge by invoking its revisional jurisdiction but without any success. However, the learned District Judge while maintaining the order of the trial Court extended the time for deposit of the balance sale price till 12.10.2018. It appears that the issue of non-deposit the balance price once again came up before the trial Court and the trial Court after taking all the events into consideration and the order of the revisional Court, extended the time for deposit of sale price till 31.10.2018 and in compliance, the appellant deposited the balance sale price on 29.10.2018. Notwithstanding the respondent challenged the order of the trial Court extending the time to

deposit the balance sale price by almost 18 days by invoking revisional jurisdiction of District Judge Lahore. However, the District Judge after hearing the parties, endorsed the order of the trial Court by dismissing the revision petition. The respondent impugned the said order before the Lahore High Court by invoking its constitutional jurisdiction. The learned High Court, after hearing the parties, through the impugned order, was pleased to set aside the order endorsing the extension of time and consequently, non-suited the appellant.

3. Leave was granted by this Court through order dated 4.11.2019 which reads as follows:-

"Learned counsel for the petitioner states that the petitioner was non-suited on the ground that the amount was not deposited within the time specified in the order. He states that the said amount was deposited within the extended time. Further states that in view of the denial of the agreement to sell, the order to deposit the amount was harsh. Leave is granted to consider the above."

4. Learned counsel for the appellant contends that since the respondent has outright denied the sale agreement and therefore, the order directing the appellant to deposit the balance sale price was very harsh. It was next contended that the order of the trial Court dated 15.07.2018, which directed the appellant to deposit the balance sale price did not provide the consequence, therefore, the suit on account of delay in depositing the balance sale consideration could not have been dismissed. Per counsel the High Court mainly relied on the judgment of this Court in the case of Hamood Mehmood Vs Mst. Shabana Ishaque & others (2017 SCMR 2022) without realizing that the facts of the said case were

totally different, as in the said case the vendee/plaintiff despite decree had failed to deposit the balance sale price, whereas, in the instant case the balance sale price was deposited during the pendency of suit with the delay of 18 days in compliance with the order of the trial Court. Therefore, order non suiting the appellant needs to be interfered by this Court.

5. On the other hand, learned counsel for the respondent mainly relied on the judgment of this Court in the case of *Hamood Mahmood* (supra), by contending that since the Petitioner admittedly has failed to deposit the balance sale price on the first date of hearing, therefore, he was rightly non-suited by the High Court.

6. We have heard the learned counsel for the respective parties and perused the record.

7. Admittedly, unlike Section 24 of the Pre-emption Act, which caste a duty upon the Court in a suit for pre-emption to require the plaintiff to deposit in Court 1/3rd of the sale price, there is no provision in the Specific Relief Act which upon filing of the suit seeking specific performance of an agreement in respect of an immovable property cast any duty on the Court or requires the vendee to first deposit the balance sale consideration, however, since the law of Specific Relief is based on the principles of equity and further that the relief of specific performance is discretionary and cannot be claimed as a matter of right, therefore, the Court in order to ensure the bona fide of the vendee at any stage of the proceedings may put him to terms.

8. Additionally, Section 24(b) of the Specific Relief Act, details the contracts which cannot be specifically enforced provides that specific performance of a contract cannot be enforced in favour of a person who has become incapable of performing or violates, any essential term of the contract that on his part remains to be performed. Therefore, the vendee while seeking specific performance/enforcement of a condition to be performed by the vendor must state that either he has performed all the conditions which under the contract he was bound to perform and/or that at all times right from the date of the agreement down to the date of filing the suit he has been ready and willing to perform/fulfill his part of the deal. He is not only supposed to narrate in the plaint his readiness and willingness at all material time to fulfill his part of the agreement but also is bound to demonstrate through supporting evidence such as pay orders, Bank statement or other material, his ability to fulfill his part of the deal leaving no doubt in the mind of the Court that the proceedings seeking specific performances have been initiated to cover up his default or to gain time to generate resources or create ability to fulfill his part of the deal. It is in that pursuit that the Court to weigh his capacity to perform and intention to purchase may direct the vendee to deposit the balance sale consideration. The readiness and willingness on the part of the vendee to perform his part of obligation also prima-facie demonstrates that the non-completion of the contract was not the fault of the vendee and the contract would have been completed, if it has not been renounced

by the vendor. Reference can be made to the case of Abdul Hamid Vs. Abbas Bhai Abdul Hussain (PLD 1959 (W.P.) Karachi 629).

9. Now coming to the case of *Hamood Mehmood* (supra), wherein, it was stated to be mandatory for the person whether plaintiff or defendant who seeks enforcement of the agreement under the Specific Relief Act, 1877, that "on first appearance before the Court or on the day of institution of the suit, it shall apply to the Court getting 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".

10. Since the referred case did not narrate the facts, therefore, in order to examine that under what circumstances, the order in the referred case was passed, we called the record of the suit file and have found that the deposit of the sale consideration was directed by consent and against execution of conveyance deed and the consequences of non-compliance was not the dismissal of the suit but vacation of the status quo order. The relevant portion of the order reads as follows:-

"In the given circumstances, the counsel for the plaintiff undertakes to deposit the balance sale consideration within seven days from the date of this order with the Nazir of this Court and having done so. Nazir to accordingly proceed with the sale transfer of the property in question in favour of the plaintiff by handing over the balance sums received to the Defendant No.1.

The counsel for the Defendant No.1 has no objection to this proposition as long as the time of seven days is adhered to the Plaintiff is accordingly directed to deposit balance sale consideration with the Nazir of this Court within seven days from the day of this order with 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(s), if he chooses to do so. To come up after seven days”.

11. At this juncture, it is important to point out that the case of *Hamood Mehmood* (supra) is a leave refusing order and cannot be held to be an enunciation of law by this Court as it has been settled by this Court in number of cases that an order granting and/or refusing leave is not a judgment which decides a question of law and therefore, it should not be followed necessarily and imperatively. In the referred case, neither any assistance was provided by the bar nor any law was discussed and consequently such order cannot be held to be a judgment of this Court deciding a matter finally or laying a principle upon the basis of law. Reference can readily be made to the case of *Haji Farmanullah Vs. Latifur Rehman* (2015 SCMR 1708), *Rana Tanveer Khan Vs. Naseeruddin and others* (2015 SCMR 1401), *Muhammad Tariq Badar & others Vs. National Bank of Pakistan & others*, (2013 SCMR 314), *Khairullah Vs. Sultan Muhammad* (1997 SCMR 906).

12. Coming to the second limb of submission, the record reflects that the order dated 15.07.2018 of the trial Court whereby the appellant in the light of *Hamood Mehmood* case (supra) was directed to deposit the remaining consideration did not provide any penal consequences, on the contrary the suit was fixed for the evidence of the plaintiff, therefore, in our opinion, the suit in the circumstances could not have been dismissed on account of non-deposit. 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 act necessary to the further progress of the suit and therefore, would result in dismissal of the suit under order 17 (3) CPC appears to be totally misconceived. The Order dated 15.07.2018 reflects that the matter was fixed for evidence of the plaintiff and record does 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) rendering the contract non-enforceable, the suit could not have been dismissed. Even otherwise, the language employed in order 17 Rule 3 by using the word, "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 few days in the face of denial of deal by the vendor was not perverse entitling High Court to interfere in its writ jurisdiction.

13. Besides, it is to be kept in mind that strict non-compliance of the directions of the Court by a vendee to deposit the balance sale price while keeping the *lis* of specific performance alive has totally different consequence than the cases where the Court while directing the balance price terminates the *lis* or where the direction to deposit the balance sale price are issued at the

instance of the vendor who has shown his readiness to perform his part of the contract. In the first instance, the Court does not lose its jurisdiction to review its order by extending time for depositing the balance sale price for the simple reason that the vendee on the face of denial or plea of termination of agreement has only to establish his *bona fide* / seriousness to stand by his part of the commitment, whereas, in the second instance the Court ordinarily becomes *functus officio* and loses its authority on the *lis* and consequently has no jurisdiction to extend time for the deposit of the balance sale price. In the instant case not only the *lis* was alive but 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 cannot be sustained and therefore, requires interference by setting it aside.

14. For these reasons, we after hearing this appeal had through oral pronouncement allowed the same with no orders as to cost.

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Islamabad

27.04.2021

A.Rehman

Not Approved For Reporting