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IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT

Mr. Justice Maqbool Baqar
Mr. Justice Manzoor Ahmad Malik
Mr. Justice Sardar Tariq Masood

(AFR)

CIVIL PETITION NO. 1444 OF 2019

(Against order dated 06.03.2019 of the
Lahore High Court, Lahore passed in Civil
Revision No.253698 of 2018)

***M/s Kuwait National Real Estate
Company (Pvt.) Ltd., and others***

Petitioners

Versus

***M/s Educational Excellence Ltd.
and another***

Respondent(s)

For the petitioners : Mr. Zahid F. Ebrahim, ASC

For Respondent No.1 : Mr. Mustafa Ramday, ASC

For Respondent No.2 : Mr. Ali Masood Hayat, ASC.

Date of Hearing : 19.09.2019

ORDER

MAQBOOL BAQAR, J. Through a Memorandum of Understanding ("**MoU**"), reached between the petitioner Nos. 2 to 5 ("**the petitioners**") and the respondent No. 1 on 13.12.2017, the petitioners agreed to sell 5,000,000 shares held by them in the petitioner No. 1 Company, namely, Kuwait National Real Estate (Pvt.) Limited ("**the Company**"), being the entire issued and paid up capital of the Company, for a total sale consideration of Rs.2,455,650,000/- (Rupees 2.45 billion). In terms of the MoU, the parties were to execute a share sale and purchase agreement ("**the agreement**"), within 60 days of the date thereof. The entire sale consideration was to be paid by the respondent No. 1 to the petitioners through deposit in the latter's bank account. However before the agreement as envisaged could be executed, the

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respondent No. 1, on 06.04.2018, filed a suit for specific performance of the MoU before a Civil Judge in Lahore, and obtained ad-interim stay order the same day. Through its suit the respondent No.1 alleged that the petitioners are avoiding to honour their commitment under the MoU. It was claimed that subsequent to the MoU, draft agreements were exchanged between the parties and that even the funds required to complete the transaction were arranged and earmarked by the respondent No.1, and that the petitioners were accordingly informed, and were requested to proceed to complete the transaction. It was further claimed that during a meeting held between the representatives of the parties on 24.01.2018, the representatives of the petitioners proposed to conclude the transaction, either by way of purchase of the shares or through purchase of the properties of the Company, which offer was accepted by the respondent No.1, and further that the parties thereafter remained engaged with each other, and that not only were the terms of the MOU reaffirmed but the petitioners expressed their commitment to sell either the shares or the properties of the Company to the respondent No.1, but they avoided and ultimately refused compliance and are now trying to sell the shares and the properties of the Company to some other party.

2. Through their written statement filed on 18.7.2018, the petitioners denied the various allegations made by the respondent No.1 in the plaint. They denied that "all the material terms of sale/purchase of shares were finalized between the parties". They submitted that in terms of the MoU itself, the transaction proposed thereby was subject to the parties executing, within 60 days thereof, a legally binding share sale and purchase

agreement. It was submitted that the draft agreement sent by the respondent No.1 did not truly reflect even the commercial terms as agreed between the parties and as contained in the MoU. It was specifically denied that no alternate option was made part of the MoU. They submitted that neither they delayed completion of the transaction nor were/are they trying to sell their share to some other party, and that contrary to the respondent No. 1's claim they were, and still are, ready to act in accordance with the MoU but cannot however accede to the respondent No. 1's desire to renegotiate the commercial terms already agreed between the parties and to prevaricate and delay the matter. The petitioners denied that they refused to sell the shares to the respondent No. 1 and submitted that it was while the parties were in the process of settling and finalizing the terms of the agreement, that the respondent No. 1 filed the suit. They expressed their willingness to fully implement the terms of the MoU and to sell the shares to the respondent No.1. subject to the respondent No. 1's depositing pay orders for the entire sale consideration, amounting to Rs.2,455,650,000/-, in Court immediately, and prayed for an order directing the respondent No.1 to immediately deposit in Court pay orders for the said amount, against which payment they, the petitioners, are ready and willing to deposit in Court the original share certificates and the corresponding transfer deeds.

3. Admittedly the only document executed between the petitioners and the respondent No.1 (collectively called the parties) is the MoU dated 13.12.2007. It was purportedly for the specific performance of the MoU that the respondent No.1 filed the suit against the petitioners. Through the MoU the respondent No.1 expressed its interest, and recorded its willingness, in principle, to

purchase the shares (recital A & D of the MoU). Clause 1.1 of the MoU states that "the buyer proposes to buy directly the legal and beneficial interest in the shares, on as is where is basis". Clause 3.1 of the MoU states that the petitioners have provided "accurate and true information about the Company and the property including its legal, accounting, financial, commercial and taxation affairs". The said clause also acknowledges that the respondent No.1 also has "conducted due diligence investigation of the Company and the property". Clause 5.1 of the MoU reiterates the above and also records confirmation from the respondent No.1 of having received all the said information. Clause 3.2 of the MoU states that "the purchase price has been mutually agreed by the parties on the basis of information provided by the seller in respect of the Company". However more significant in the present context is clause 3.3 of the MoU which read as "the sellers have provided accurate and true information to the extent such information is in the sellers' knowledge on the date of this MoU, regarding the existing litigation, legal proceedings, claims and/or disputes involving the Company and/or the property as specified in Schedule 3 of this MoU (the "existing litigation"), and the buyer has signed this MoU with complete knowledge of the existing litigation". As per recital "C" of the MoU, the assets of the Company, comprises of various pieces and parcels of land as described in Schedule 2 of this MoU ("the property"). It may be relevant to note here that the properties described in schedule 2 are the same properties as mentioned by respondent No.1 in its suit, and in respect whereof the suit has been filed. Whereas Schedule 3 of the MoU gives details of the suit filed by the respondent No. 2, against the company for specific performance in respect of the land owned by the Company and of another suit filed by one Asad Muhammad

against the respondent No. 2, and the Company in respect of the said land. Whereas recital B of the MoU states that the parties have agreed regarding, *inter alia*, the specific liabilities of the Company and that of the sellers, which shall be assumed by the buyers. Amongst the various conditionalities of the proposed transaction, the one as specified through clause 4.1(C) reads as "the buyer agreeing in writing to fully and unconditionally accept and assume all existing and future liabilities, risks, claims damages and/or losses in respect of the existing litigation as specified in Schedule 3 of the MoU".

4. The willingness of the respondent No. 1 to, in principle, agree to buy the shares, as expressed in recital-D is "subject to the agreement and signatures by the parties of a legally binding share sale and purchase agreement to be executed by the buyers and the sellers within 60 days of the MoU". Such conditionality has also been recorded in clause 4.1(b) as, "the parties agreeing, signing and exchanging a detailed and legally binding share sale and purchase agreement, incorporating all the terms of the proposed transaction.....". Clause 7.1 of the MoU stipulates that "following the execution of this MoU, the parties will seek to settle and enter into a definitive share sale and purchase agreement within 60 days of the MoU. This stipulation has been reiterated through various other clauses also. Clause 2.2(b) stipulates prompt payment of the purchase price by the respondent No.1 through deposit in the Bank account to be nominated by the petitioners in Pakistan. In order to assure the petitioners of the prompt payment, the respondent No.1 through clause 3.5 represented and warranted that "it has sufficient financial resources to pay fully and unconditional purchase price

to the sellers on the completion date". Whereas the completion date, as is patently evident from the combined reading of clause 8.1, (which clause required the parties "to settle and enter into the share sale and purchase agreement on/or before the completion date"), and recital (D) and clauses 2.2(a) and 7.1, (which recitals and clauses stipulate settlement of the terms and execution of the agreement within 60 days of the MoU) was sixtieth (60th) day from the date of the MoU. The MoU through clause 8.3 stipulates that the same, and the negotiations in respect of the transaction proposed thereby, shall automatically terminate on the 60th day following the date of the MoU.

5. Admittedly no agreement as envisaged by the MoU has been executed between the parties. Delay in the matter is being blamed by the parties on each other. The agreement was to be executed within 60 days of the MoU, i.e. 12.2.2018. The MoU and the negotiations in pursuance thereof were to terminate of the 60th day from the date of MoU. The suit was filed by respondent No.1 on 06.4.2018. No amount towards the purchase price was deposited/paid and/or offered to be paid/deposited by respondent No.1, at the time of filing of the suit and obtaining the stay order. They did not do so even in response to the offer made by the petitioners through their written statement on 18.7.2018. In the meanwhile, the petitioner No. 1 Company filed an application for deletion of its name from the proceedings. It was submitted that it is not even a party to the MoU, specific performance whereof is being sought through the suit. Whereas the respondent No. 2, sought its impleadment in the proceedings on the ground that the suit filed by it for the specific performance of an agreement executed between the applicant and the petitioner No.1 Company

in respect of the Company's property is pending adjudication. In their reply, resisting the respondent No.2's impleadment, the petitioners submitted that the suit filed by the respondent No.1, was in relation to an MoU pertaining to the share held by them in the petitioner Company, whereas the respondent No.2's claim was in respect of the property owned by the Company, and that the ownership of the shares will have no bearing on the respondent No.2's suit. Both the applications along with the respondent No.1's stay application came to be heard as late as on 13.11.2018, and through an order of the same date, i.e. 13.11.2018, the learned Civil Judge directed the respondent No.1 to deposit the purchase price in Court within 30 days, with a caution that in case it fails to comply, the suit shall be dismissed. The Court also allowed the respondent No.2 to join the proceedings and dismissed the petitioner No.1, company's application for its deletion from the array of the defendants. The respondent No.1 still 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 before the Lahore High Court. The revision petition was accompanied by an application seeking suspension of proceedings before the learned Civil Judge. On 05.12.2018 a learned Judge of the High Court in Chambers suspended the proceedings before the learned Civil Judge subject to the respondent No. 1's depositing Rupees. 200 Million with the Deputy Registrar (Jud) of the High Court within three weeks. Such suspension was challenged by the petitioners through a petition for leave to appeal, which petition was disposed of by this Court through an order dated 07.02.2019, with a direction to the learned High Court to dispose of the matter within three weeks. However, the petition was heard by the High Court on 6th March 2019 only, and through an order of even date,

the Court set aside the order of the learned Civil Judge to the extent of deposit of the purchase price within 30 days of the said order, and directed the learned Civil Judge to proceed and decide the question, as to whether or not the respondent No.1 should be required to deposit the purchase price, only after the plaint has been amended in terms of order dated 13.11.2018 and the petitioner No.1 and the respondent No.2 have filed their respective written statements, so that the decision be made keeping in view the pleadings of all the parties. It was so directed, as statedly, in view of the learned Single Judge, in the event the respondent No. 2 "succeeds in his suit the dominant purpose of the petitioner (the present respondent No. 1), entering into the MoU with respondents No. 2 to 5 (the present petitioners No. 2 to 5) would cease to exist".

6. As discussed earlier, the MoU was executed between the parties solely and exclusively in respect of the petitioners shares in the Company. The respondent No. 1 was well aware not only of the fact that two suits, one filed by the respondent No.2, and the other by another person, seeking specific performance in respect of the properties of the Company, as detailed in the MoU, were pending, and has also acquired the details of the liabilities of the Company and that of the petitioners, and regarding the various disputes, claims, litigation, legal proceedings etc. in respect of the Company and its property, but as per the MoU it also agreed to fully and unconditionally accept and assume all existing and future liabilities, risks, claims, damages and/or losses in respect of the litigation as specified in the MoU, and noted in detail hereinbefore, and therefore to say that in case the respondent No.2 succeeds in his suit the purpose of the MoU would cease to exist, is wholly misconceived and untenable. In fact, the outcome of the

said litigation would have absolutely no bearing on the rights and obligations of the parties under the MoU. The agreement, as envisaged by the MoU, has admittedly not been executed between the parties. The parties are blaming each other for non-compliance of the above essential requirement. It is now well settled that a party seeking specific performance of an agreement to sell is essentially required to deposit the sale consideration amount in Court. In fact, by making such deposit the plaintiff demonstrates its capability, readiness and willingness to perform its part of the contract, which is an essential pre-requisite to seek specific performance of a contract. Failure of a plaintiff to meet the said essential requirement disentitles him to the relief of specific performance, which undoubtedly is a discretionary relief. However, neither the respondent No. 1 at the time of filing of the suit and obtaining an ad-interim stay order deposited, offered to deposit, and/or demonstrated its ability, readiness and willingness to deposit the purchase price, it also failed/avoided to make such deposit even after the learned Civil Judge directed it to do so after it has enjoyed the ad-interim stay order for 7 (seven) months without any payment. In order to still avoid payment it filed a revision petition against the Civil Court's direction for deposit and obtained ad-interim order for suspension of the proceedings before the Civil Court. However the order of suspension of the proceedings before the Civil Court was suspended by this Court through order dated 07.02.2019, with a direction to the learned Single Judge to dispose of the matter within three weeks.

7. The plea of the learned counsel for the respondent No.1, that since, according to him, the petitioners have conceded to the respondent No.1, claim, the suit sought to have been

decreed in terms of Order XII Rule 6 CPC, it may be noted that the petitioners' offer to sell the shares to the respondent No.1 as contained in their written statement, was undoubtedly subject to compliance with the MoU and to the respondent No.1's depositing in the Court the purchase price, the same cannot, by any stretch of imagination, be deemed as an admission, resulting in an order decreeing the suit. Similarly the willingness to deposit in Court the share certificates and the transfer deed, expressed by the petitioners in their written statement, was clearly subject to deposit of the pay orders by the respondent No.1. The same even otherwise also cannot be construed as their conceding to the relief sought by the respondent No.1, for the reason that the deposit of share scrips and the transfer deed, would not have by itself translated into transfer of the shares in favour of the respondent No.1, without their being an order of the Court to such effect and handing over of the said documents to the respondent No.1, to have the transfer recorded accordingly. In any view of the matter even if the aforementioned contents of the written statement are stretched so as to construe them as an admission, the same still would not meet the requirement, for those to result into an order decreeing the suit, as it is now well settled that in order to invoke the provisions of Order XII Rule 6 CPC it is absolutely necessary that the admission relied upon be clear, unambiguous, unqualified and unequivocal, and further that the purported admission has to be read as a whole, one cannot be allowed to rely on a part ignoring the rest. Whereas in the present case the purported admission, as is patently clear from the foregoing analysis of the facts of the case, particularly that of the contents of the written statement, do not meet any of these essential qualifications repeatedly prescribed by this Court for invoking the provisions of

Order XII Rule 6 CPC. It was perhaps in view of the foregoing that the respondent No.1 did not file any application under the said provision.

8. In the light of the above discussion, we are of the firm view that there was no justification for the High Court for interfering with the order dated 13.11.2018 of the learned Civil Judge and would therefore convert this petition into an appeal and allow the same. The impugned order is set-aside and the order dated 13.11.2018 passed by the learned Civil Judge in the respondent No.1's suit stands restored, the consequences prescribed thereby shall follow.

Sd/ — J
Sd/ — J
Sd/ — J

Islamabad, the
19th September, 2019
(Amir Sh.)

'APPROVED FOR REPORTING'

Amir
22/11/19