

IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

R.A. No. 14 of 2012
R.A. No. 170 of 2015

DATE

ORDER WITH SIGNATURE OF JUDGE

16.03.2020

Mr. Abdul Rashid Mughal advocate for applicant in R.A. No.14 of 2012 and for respondent No.2 in R.A. No.170/2015.

Mr. Nauman Raja Khan advocate for applicant in R.A.No.170 of 2015.

Mr. Gulab Khan Kaimkhani advocate for respondent No.1 in R.A. No.170/2015.

Mr. Muhammad Ismail Bhutto, Addl.A.G.

ORDER

MUHAMMAD SHAFI SIDDIQUI, J. I have heard the learned counsel at length and perused the material available on record.

There are two revision applications before me. The first R.A. No.170/2015 is in respect of the suit for specific performance of contract filed by respondent No.1. The suit was filed by respondent No.1 Allah Din son of Moinuddin against Taj Muhammad being father of Altaf Hussain and Khadim Hussain, the applicant and respondent No.2, respectively. At the time when suit was filed Taj Muhammad was alive, however, during pendency Taj Muhammad expired leaving behind two legal heirs referred to above. At some point of time Altaf Hussain was working in Saudi Arabia. He, however, returned in the year 2009 and filed an application under Order IX Rule 7 C.P.C. However, by that time the suit was already decreed. The trial court decreed the suit of specific performance of contract though Taj Muhammad was declared exparte. During the pendency of the suit respondent No.1 never deposited

the balance sale consideration of Rs.7,75,000/-. The total sale consideration as argued by respondent No.1's counsel was Rs.9,75,000/- out of which it is claimed that he paid only Rs.2,00,000/- as a token towards sale consideration to Taj Muhammad, the predecessor of the applicant and respondent No.2. He retained a substantial amount that is almost 80% of the property and never deposited the amount as an interim measure and to show his *bona fide*. The specific performance is not a right rather only a discretion that was to be exercised by the trial court and appellate court under the circumstances of the case. Meaningfully, no interim order was obtained to save respondent No.1 from the responsibility of depositing the amount of balance sale consideration which is almost more than 80%. The money kept on depreciating and the value of the property kept on appreciating. The respondent No.1 despite the fact that he was ordered to deposit the sale consideration at the time of announcement of the final judgment in May 2012 again failed to respond and never deposited the amount till decision of the appeal in Civil Appeal No.11/2012 which was disposed off on 22.09.2015. In my view, since specific performance is not a right of a person allegedly buying the subject property, it is to be exercised after due diligence. The conduct of the alleged buyer cannot be ignored who purposely and deliberately avoided to make payment of the balance sale consideration which is a substantial part that is more than 80% of the alleged total sale consideration. Learned counsel for respondent No.1 has only pleaded that he was never directed by the trial court as well as appellate court during pendency of the appeal and during pendency of suit to deposit the amount. It is not for the court to pass such orders rather it is the *bona fide* to be disclosed by the buyer and the first litmus test to discharge the *bona fide* was that the amount should have been deposited immediately at the time when the suit was filed as he is still pleading that

he was willing to pay the balance sale consideration. In the absence of such deposit it cannot be presumed that he was willing to pay the amount to the deceased Taj Muhammad or to his legal heirs. I am, therefore, of the view that the trial court had not exercised the jurisdiction vested upon it as it was to be ascertained first whether the intention of the alleged buyer was *bona fide* or not and so also the jurisdiction exercised by the appellate court in not considering this fact that the balance sale consideration of Rs.7,75,000/- which is almost more than 80% was not deposited and the beneficiaries were deprived of not only the money to be paid at the relevant time but also suffered from its devaluation whereas on the contrary the immovable property kept on appreciating. The trial court and appellate court should have considered this aspect while considering this discretionary relief. The respondent No.1 had not approached the trial court and appellate court with clean hands and it could be seen when he failed to show *bona fide* by not depositing the amount.

In view of above, the concurrent findings of two courts below is set-aside and Revision Application No.170/2015 is allowed.

Insofar as the connected Revision Application No.14/2012 is concerned, the plaint was rejected under Order VII Rule 11 C.P.C. on the ground that certain parties were not arrayed as necessary and proper party being alleged buyers. It was a suit between two sons and father to the extent of a declaration that the construction raised on the subject plot was out of the funds of the applicant. There was no question of rejecting the plaint under Order VII Rule 11 C.P.C. by not impleading the necessary and proper party. In case, in the opinion of the trial court and appellate court the suit was not maintainable, an issue ought to have been framed. I, thus, set-aside the two orders of the trial court and appellate court which maintained the order whereby the plaint was rejected under Order VII Rule 11 C.P.C. and remand the

case back to the trial court to dispose off the suit in accordance with law after recording evidence.

Pending applications in both Revision Applications also stand disposed of.

JUDGE

Ali Haider