

Order Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Second Appeal No. 07 of 2020

Date	Order with signature of Judge
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Hearing / Priority :

1. For hearing of CMA No.165/2020 :
2. For hearing of Main Case :

Appellants : Raja Zafar Mehmood, Raja Hassan Mehmood
and Raja Saleem Mehmood,
through Mr. Muhammad Suleman Khan Advocate.

Respondent No.1 : Meer Gul, through Mr. Muhammad Anwar Jatoti Advocate.

Respondents 2 to 4 : Sub-Registrar Sanghar, Mukhtiarkar (Revenue) Sanghar
and Province of Sindh, through Mr. Allah Bachayo
Soomro, Additional Advocate General, Sindh.

Date of hearing : 22.02.2021.

ORDER

NADEEM AKHTAR, J. – F. C. Suit No.92/2011 was filed by respondent No.1 against the appellants for specific performance and permanent injunction which was dismissed by learned Ist Senior Civil Judge Sanghar vide judgment and decree dated 16.02.2016. However, the said dismissal was set aside and the Suit was decreed by learned IInd Additional District Judge Sanghar vide judgment and decree dated 19.12.2019 and 21.12.2019, respectively, in Civil Appeal No.28/2016 filed by respondent No.1 against dismissal of his above Suit. This Second Appeal has been preferred by the appellants against the impugned judgment and decree of the learned appellate Court.

2. Relevant facts of the case are that the above Suit was filed by respondent No.1 against the appellants and official respondents 2 to 4 for specific performance and injunction in respect of 129-08 acres out of 160-00 acres in agricultural land bearing Survey Nos.18, 19, 21, 22, 23, 24, 25, 26, 27, 28 and 29, situated in Deh Lib, Taluka and District Sanghar (**'suit land'**). It was the case of respondent No.1 that the appellants, who are real brothers, were the co-owners of the undivided suit land ; appellant No.1 agreed to sell the suit land to him in consideration of Rs.8,500,000.00 ; a sale agreement was executed in this behalf on 31.01.2009 by appellant No.1 for self and on behalf of appellants 2 and 3 in the presence of two witnesses ; part payment of Rs.500,000.00 was made by him to appellant No.1 at the time of execution of the sale agreement ; the balance sale consideration of Rs.8,000,000.00 was to

be paid by him in two equal installments of Rs.4,000,000.00 each on 15.02.2010 and 15.02.2011 ; he paid amounts of Rs.4,000,000.00 and Rs.2,000,000.00 to appellant No.1 on 15.02.2011 and January 2011, respectively ; after receiving the above amounts from him, possession of the suit land was handed over to him by appellant No.1 ; thereafter, despite his requests to complete the sale in his favour, appellant No.1 failed to do so ; a cheque of Rs.2,700,000.00 issued by appellant No.1 was received by him through a broker who informed him that appellant No.1 has returned the said amount as he did not want the sale to be completed in his favour ; and, respondent No.1 had always been and was still ready and willing to perform his agreed part of the contract, but appellant No.1 had failed and refused to perform his agreed part of the contract. In the above background, the Suit was filed by respondent No.1 praying that appellant No.1 be directed to execute the sale deed in his favour, and consequential relief of injunction was also sought by him.

3. A joint written statement was filed by the appellants wherein the averments and allegations with regard to the payments made by respondent No.1 and the breach of contract alleged by him against the appellants, were denied. It was alleged by the appellants that only an amount of Rs.300,000.00 was paid by respondent No.1 whereafter he did not make any further payment ; and, due to the breach of the terms and conditions of the agreement committed by respondent No.1, the agreement stood cancelled. It was specifically denied by the appellants that respondent No.1 had performed his agreed part of the contract or was ready and willing to do so. It was asserted by them that in view of the breach of contract committed by respondent No.1, he was not entitled to the relief prayed for in the Suit.

4. Record shows that in his plaint respondent No.1 / plaintiff had alleged certain payments under the sale agreement which were denied by the appellants in their written statement. Be that as it may, perusal of the plaint, particularly paragraphs 6, 7 and 8 thereof, shows that even according to respondent No.1 himself it was an admitted position that the entire agreed sale consideration had not been paid by him to the appellants till the institution of the Suit. Despite this admitted position, he did not deposit the balance sale consideration in Court at the time of institution of the Suit or on the date of first appearance, nor did he file any application before the learned trial Court at any of the above stages seeking permission to deposit the balance amount in Court. Due to such failure on the part of respondent No.1, his Suit was liable to be dismissed. My above view is fortified by Hamood Mehmood V/S Mst. Shabana Ishaque and others, **2017 SCMR 2022**, wherein it was held by the Hon'ble

Supreme Court that it is mandatory for the person, whether plaintiff or defendant, who seeks enforcement of an agreement under the Specific Relief Act, 1877, that on the first appearance before the Court or on the date of institution of the Suit, they shall apply to the Court for 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. The view is further fortified by a more recent pronouncement viz. Messrs Kuwait National Real Estate Company (Pvt.) Ltd. and others V/S Messrs Educational Excellence Ltd. and another, **2020 SCMR 171**, wherein the Hon'ble Supreme Court was pleased to hold that it is now well-settled that a party seeking specific performance of an agreement to sell is essentially required to deposit the sale consideration in Court ; in fact, by making such deposit the plaintiff demonstrates its capability, readiness and willingness to perform its agreed part of the contract, which is an essential pre-requisite to seek specific performance of a contract ; and, failure of a plaintiff to meet the said essential requirement disentitles him to the relief of specific performance, which undoubtedly is a discretionary relief. In the above context, I may also refer to Allah Ditta V/S Bashir Ahmad, **1997 SCMR 181**, and Haji Abdul Hameed Khan V/S Ghulam Rabbani, **2003 SCMR 953**, wherein the order of dismissal of the Suit for specific performance passed by the trial Court due to the plaintiff's failure in depositing the balance sale consideration in Court, was upheld the Hon'ble Supreme Court.

5. It is important to note that the readiness and willingness by a party to a contract to perform its agreed part of the contract is a condition precedent for that party for instituting a Suit for specific performance of such contract under the Specific Relief Act, 1877, against the party committing breach of the contract. Such readiness and willingness must be genuine, real and meaningful, and not merely a statement without any meaning and intention as there is a vast difference between the capability or ability to perform the agreed part of the contract and the readiness and willingness to do so. A party may be fully capable and able to fulfill its obligations under the contract, and yet it may not be serious, ready or willing to do so. In a Suit for specific performance, it is obligatory upon the plaintiff to demonstrate in unequivocal terms in his pleadings, as well as by his conduct throughout the proceedings, that he has always been and is still serious, capable, ready and willing to perform his agreed part of the contract. Such seriousness, readiness and willingness of the plaintiff is the essence of and a condition precedent for seeking specific performance of contract, and in the absence thereof, the equitable and discretionary relief of specific performance cannot be granted. The seriousness, capability, readiness and willingness to perform its agreed part of the contract,

being the condition precedent for seeking specific performance, can be judged from the conduct of the party seeking such relief. The main object and essence of this condition precedent in a Suit for specific performance, as I understand, is to ensure that specific performance is sought only by such party to the contract who is serious, capable, ready and willing to perform its agreed or remaining, as the case may be, part of the contract despite the fact that the other party has committed breach thereof ; and, to discourage such persons who are not serious, capable, ready and or willing to perform their agreed / remaining part of the contract and who are interested only in dragging the other party in unnecessary litigation in order to pressurize them.

6. Perusal of the judgments delivered by the learned Courts below shows that both the learned Courts completely failed to notice and appreciate the above important aspect of the case which was an essential pre-requisite and a condition precedent for respondent No.1 to seek specific performance of the sale agreement, as held by the Hon'ble Supreme Court in the above-cited authorities. The pronouncements made by the Hon'ble Supreme Court in Allah Ditta and Haji Abdul Hameed Khan (supra) were in the field when the judgment was delivered by the learned trial Court, and the said pronouncements as well as the law laid down by the Hon'ble Supreme Court in Hamood Mehmood (supra) were in the field when the impugned judgment and decree were passed by the learned appellate Court. Therefore, both the learned Courts below also failed to follow the law on this point laid down by the Hon'ble Supreme Court. Instead of noticing the above aspect and accordingly following the above-cited authorities, both the learned Courts below proceeded to decide the case on the basis of the evidence on record. In my humble opinion, such exercise by the learned Courts below was futile as failure on the part of respondent No.1 in depositing the balance sale consideration in Court at the time of institution of the Suit or on the date of first appearance or in making an application before the learned trial Court at any of the above stages seeking permission to deposit the balance amount in Court, was fatal. Due to this reason, the findings of the learned Courts below, being irrelevant and inconsequential, do not require any comment or discussion.

7. Foregoing are the reasons of the short order announced by me on 22.02.2021 whereby this appeal was allowed with no order as to costs, and F. C. Suit No. 92 of 2011 filed by respondent No.1 was dismissed. Listed application stands disposed of accordingly.

J U D G E