

**HIGH COURT OF SINDH, CIRCUIT COURT  
AT HYDERABAD**

R.A No.54 of 2011

DATE	ORDER WITH SIGNATURE OF JUDGE
	1. For hearing of CMA No.1584/2017
	2. For hearing of CMA No.1828/20
	3. For hearing of main case
Applicant	: Through Mr. Arbab Ali Hakro advocate
Respondent	: Through Mr. Parkash Kumar advocate
Date of hearing	: 20.09.2019
Date of decision	: 20.09.2019

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**J U D G E M E N T**

**MAHMOOD A. KHAN J.**- 1. Application for restoration of main revision is pending in respect of which learned counsel for the respondent consented that in case learned counsel for the applicant is willing to proceed with the main case today the same be allowed. The said application as such stands allowed and with the consent of the learned counsels the revision application stands restored and, was heard.

2. As the revision is being heard and decided finally this application stands disposed of not requiring entertainment.

3. (1) This revision arising out of concurrent findings wherein suit of specific performance filed by the respondent before the learned trial Court was decreed after framing of issues and leading of evidence and the learned appellate Court also dismissed the appeal filed thereto without disturbing the impugned order.

(2) The respondent/plaintiff in this matter claimed that the subject property was agreed to be sold by sale agreement dated 23-6-2006 against payment of Rs.5,00,000/- (Rupees Five Lacs Only) for a total payment required in the sum of Rs.21,00,000/- (Rupees Twenty One Lacs Only) to which the purchaser was

always willing to perform but the applicant/defendant/seller delayed on the pretext of acquiring CNIC in order to execute the sale deed. Whereas the stand of the respondent although admitting the execution of the said sale agreement and receipt of the amount is that the seller having failed to perform according to the essence of the contract being time of 3 months being defaulter stands forfeited as penalty. The learned trial Court in accordance to the pleading was pleased to frame 5 issues from maintainability of the suit, the sale agreement and its payment, liability of execution of sale deed, approach by the purchaser to the seller for execution of sale deed and the entitlement of the specific performance and concluded in favour of the seller holding that as the purchaser had proved this case by bringing forward required evidence whereas the defendant failed to prove his stand by any positive evidence, further referring to an attempt by the Nazim of the area for a settlement wherein also it is recorded that the seller not willing to sell the subject property was not found willing to pay back the earnest amount in full. The appellate Court was pleased to maintain the said judgment by framing the point of requiring interference and having discussed the evidence.

(3) Learned counsel for the applicant contends that the suit for specific performance was filed wherein agreement was admitted and the learned trial Court failed to properly frame the issues whereby the dispute between the parties was liable to be adjudicated upon especially as to the failure of to the balance amount which was never deposited with the learned trial Court at the required time. It is further contended that that earnest amount of Rs.5,00,000/- was forfeited as failure on part of the respondent was present to come up with the balance amount within the time frame agreed. Learned counsel for the applicant in this regard has referred to the issues as framed by the learned

trial Court, discussion made therein and thereafter discussion made by the learned appellate Court in the matter.

(4) Learned counsel for the respondent, however, contended that there was complete failure on part of the applicant to come up to the terms of the agreement and a wrong pretext of old NIC was used and failure was present on part of the applicant to show any element of giving back the earnest amount of Rs.5,00,000/- as such the applicant had retaining the earnest amount as well as possession of the suit property and the respondent was forced to file the suit for specific performance. It is further contended by the learned Counsel that as an outcome of the decree sale deed of the subject property has since been got executed by the concerned Nazir on 26-5-2011 after deposit of the balance amount and also presented a photocopy of the same.

(5) Having heard the learned counsel present and gone through the record. It bears therefrom that agreement of sale was made on 23.06.2006 whereas the suit was filed on 17.08.2007. The parties have led their evidence, wherein the respondent has acquired the concurrent findings. No dispute as to framing of issues made during the proceedings has been shown to discard the concurrent findings. As to the contention that failure was present on part of respondent, the applicant has nothing to stand onto, nothing has been shown from the record for the failures attributed, no notice of readiness has come up along with any sufficient material to discrediting the version of NIC and CNIC present on part of the purchaser. The applicant by his conduct of not returning the earnest amount or brining any material to justify retaining the same has extended the time, violating the version as to time being essence of contract from the wordings of the agreement which stood overruled by his own conduct as present on record. As to

the payment of the balance amount no calling is found available and same becomes immaterial in view of the refusal stand taken by the applicant. The subject agreement itself carries a penal clause in the sum of Rs.500,000/- on the defaulting party, however the same in my understanding can only be entertained subject to proof of loss to which no party has brought any evidence as such it is apparent that they have abandoned the same themselves. There is however another aspect of the matter being the difference of price agreed to in the year 2006 for which the sale deed has been acquired in the year 2011 at the same price and possession is being claimed now to which no sense of equity is present which is otherwise also found missing in the impugned orders. I have called upon the learned counsel for the respondent to show the element/sense of equity bearing from the impugned orders, or despite failing of which the specific performance arising from law of equity may sustain. Learned counsel for the respondent, however considering the said element, though stated that execution in the matter has since been allowed in the year 2011 wherein balance amount was paid, has failed to show any element of equity or even the consent present on part of the applicant to the extent of even the withdrawal of the said amount, if any, present on part of the applicant. Learned counsel for the respondent, however, after consulting with his client stated before the Court that he is willing to pay the amount according to present market value as available.

(6) It is as such held accordingly that the respondent shall made the payment according to the present schedule value of property, with the benefit of earnest amount in sum of Rs.5,00,000/-. It is as such ordered that he respondent shall make up for and pay 76% (the sum of Rs.5,00,000/- being 23.8% of 21,00,000/-) of the present scheduled value of the subject\

property to the benefit of the owner/applicant within a period of 130 days from this date wherein the amount already paid on his part in the execution proceedings shall be also adjusted to acquire validity to the sale deed already stood executed in his favour and no further sale deed shall be required to be executed. Applicant shall be entitled for withdrawal of amount along-with any benefit, if any as may be available thereto, from the learned executing/trial Court. On payment of the amount as discussed above the possession of the subject property shall be available to the respondent without any further notice, however, in failure thereof the applicant shall be liable to pay a sum of Rs.5,00,000/- with profit/interest from the date of filing of the suit till realization at the banking rate within a period of 60 days thereafter and in failure of making the payment the same is to be realized from the sale of the subject property whereon the said sale deed got execute on 26-5-2011 shall be got cancelled.

This revision application stands disposed of in the above terms with no orders as to costs.

Sd/- MEHMOOD A. KHAN,  
JUDGE