

IN THE HIGH COURT OF SINDH, KARACHI

Present

Mr. Justice Zulfiqar Ahmad Khan
Mr. Justice Mahmood A. Khan

HCA No. 27 of 2021

Muhammad Moeed Khan Appellant
Versus
Mst. Sehar Gul and others & others Respondents

Appellant : Through Mr. Ashok Kumar Gulani, Advocate
Respondent No.1 : Through Mr. Muhammad Ghaffar Khan
Kakar, Advocate
Respondent No.2 : *Nemo*
Respondent Nos.3 to 5 : Through Mr. Meeran Muhammad Shah,
Additional Advocate General
Date of hearing : 16.03.2021
Date of order :03.2021

JUDGMENT

Zulfiqar Ahmad Khan, J:- The instant High Court Appeal has been preferred against orders dated 28.07.2020 and 01.02.2021 passed by the learned single Judge of this Court in Suit No.704 of 2020 (Muhammad Moeed Khan v. Mst. Sehar Gul and others), whereby suit of the plaintiff was dismissed by the first order due to failure of the plaintiff to deposit balance sale consideration of Rs.10,000,000 (Rupees Ten Million) with the Nazir of this Court. Thereafter, the Appellant also filed a Review Application before the learned single Judge, which too was dismissed by the second order.

2. Succinctly, facts of the instant High Court Appeal are that Appellant filed Suit No.704 of 2020 for specific performance of contract, damages, cancellation of documents and permanent injunction against the defendants-respondents on the ground that the Appellant entered into sale

agreement with Respondent No.1 on 12.09.2019 in respect of piece of land admeasuring two acres, twenty Ghuntas from survey No.223, Deh Khanto, Tappo Ibrahim Hyderi, Malir, Karachi (“the subject property”) for the total sale consideration of Rs.18,000,000 and the Appellant had paid amount of Rs.5,000,000 to Respondent No.1 on 15.09.2019 and Rs.3,000,000 on 10.03.2020, both in cash.

3. Learned counsel for the Appellant contended that while passing the impugned order dated 28.07.2020, the learned single Judge failed to appreciate the fact that the matter was fixed 28.07.2020 during Court vacations and Covid-19 pandemic due to which the Appellant could not deposit the balance sale consideration with the Nazir of this Court; that the finding of the learned single Judge that the balance sale consideration ought to be deposited within one month after institution of the suit was erroneous, as there was no such direction from the Hon’ble Court; that the condition for deposit of the balance sale consideration was for the maintaining of *status quo* order passed on CMA No.5140 of 2020, and on 28.07.2020, the said Injunction CMA was fixed for hearing, at the most the said CMA could have been dismissed, whereas the learned Single Judge chose to dismiss the main suit of the plaintiff; that the Appellant was not provided sufficient time to deposit the balance sale consideration, which, he is ready to do at this juncture. Learned counsel, by placing reliance on the case of *Hamood Mehmood v. Mst. Shabana Ishaque and 3 others* (2018 YLR 713), submitted that the deposit of balance sale consideration is not mandatory in the cases of specific performance rather it is the *bonafide* of the purchaser and his willingness in purchasing the property, which aspect has totally been ignored. He lastly contended that the suit of the plaintiff to the extent of damages ought to have been decided after recording of evidence. Learned counsel for the Respondent did not consent to these submissions.

4. We have called for the file of the suit. To understand the bonafide, conduct and forthcomingness of the appellant in depositing the balance sale consideration, it would be pertinent to note that when plaint of the Suit was presented on 24.06.2020, the appellant/plaintiff moved three CMAs bearing No.5629/2020 (for urgency), CMA 5139/2020 (application for exemption) and CMA 5140/2020 (under Order XXXIX rules 1 & 2 CPC). The said suit for the first time was taken up on 16.07.2020 when the learned Single Judge on the injunction application CMA 5140/2020 directed the plaintiff to deposit the balance sale consideration of Rs.10 Million with the Nazir of this Court as it was alleged by the counsel for the plaintiff that out of the total sale consideration of Rs.18 Million, Rs.8 Million was already paid to the defendant and the plaintiff was seeking a stay. Relevant portion of the order dated 16.07.2020 is reproduced as under:-

“Issue raised merits consideration. Office is directed to issue notice to the defendants as well as Advocate General, Sindh for 28.07.2020. In the meanwhile, the defendants are directed to maintain status quo with respect to the suit property, subject to deposit of Rs.100,00,000/- by the plaintiffs before the Nazir of this Court.”

It is also matter of record that no application on the first date of hearing for payment of the balance sale consideration was voluntarily moved by the plaintiff nor the plaintiff's counsel undertook to pay the same. Be that as it may, on the next date of hearing viz. 28.07.2020 having noted that the plaintiff has not made compliance of this Court's earlier order of depositing the balance sale consideration with Nazir of this court and by placing reliance on the case decided by the Hon'ble Supreme Court being ***Hamood Mehmood v. Mst. Shabana Ishaque & others (2017 SCMR 2022)***, the suit along with all pending applications was dismissed. Thereafter, the plaintiff moved a review application bearing CMA No.7343/2020 seeking review of the afore-mentioned order of the learned single Judge. In the said application, the plaintiff admitted that he was unable to make the payment on account of Covid-19 pandemic,

however, neither in the said application nor in the prayer thereto plaintiff opted to deposit the balance payment of Rs.10 Million. The said application was accordingly taken up by the learned single Judge on 01.02.2021 where the second impugned order was passed. It is pertinent to note again that even on that date of hearing no undertaking was given by the plaintiff that he is willing to make payment of the balance sale consideration with the Nazir of this Court. This appeal which has been preferred against the impugned orders was presented on 13.02.2021 along with three applications; first being CMA No. 371/2021 (seeking urgency), (2) CMA No.372/2021 (seeking exemption) and (3) CMA No.373/2021 (under Order XXXIX rules 1 & 2 CPC), while mentioning these facts even at the time of presentation of this appeal no indication was made nor any application was made by the Appellant seeking permission to deposit the balance sale consideration of Rs.10 Million.

5. When posed with the question as to any illegality in the impugned order, which is based on the dictum laid down by the Hon'ble Supreme Court in the case of *Hamood Mehmood v. Mst. Shabana Ishaque and others* reported as 2017 SCMR 2022, the learned counsel submitted that in the said case the plaintiff was given many chances to pay the balance sale consideration, and eventually the Hon'ble Court dismissed the suit on non-payment of the balance sale consideration, whereas in this case no proper chance has been given. When this attention was drawn to para 3 of the said judgment where the Hon'ble Supreme Court held that "*It is 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 date 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*" learned counsel placed reliance on the case of *Hamood Mehmood v. Mst. Shabana Ishaque and 3 others*, reported as

2018 YLR 713. When pointed out as to how a judgment of Hon'ble Supreme Court could be offsetted with a judgment of a High Court and that too between the same parties, as the learned counsel is attempting to do, counsel had no satisfactory answers.

6. Admittedly relief of specific performance is a discretionary and equitable relief and that the same may be declined if the Plaintiff fails to plead in accordance with the statutory requirements laid down under the Specific Relief Act, 1877. In the case of **Mst. Samina Riffat v. Rohail Asghar** (2021 SCMR 7) the Hon'ble Supreme Court in the circumstances where the plaintiff-vendee on one hand failed to offer sale consideration within the agreed period; secondly he did not tender the said amount despite order of the Trial Court, and even after his suit for specific performance was dismissed, he made no effort to deposit the balance consideration, no case of specific performance was made and the Hon'ble Supreme Court displaying grace towards the plaintiff, directed defendant to refund 50% of the earnest money received by them to the plaintiff within 45 days. In the case reported as **Naseer Ahmed Siddiqui v. Aftab Alam** (2011 PLD 323 SC) where the vendee had not deposited balance sale consideration at least till the suit was decreed and there was nothing to show whether the said amount was deposited even thereafter or not, no specific performance could be claimed. In **Hamood Mehmood v. Mst. Shabana Ishaque and others** (supra) as stated above the Hon'ble Supreme Court has carved this equity principle in the following words:-

"3.It is 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 date 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."

It is for these reasons through our short order dated 16.03.2021 we chose to dismiss the instant appeal in connection with the impugned orders of the learned Single Judge dated 28.07.2020 and 01.02.2021,

however with regards the damages which may include the amount alleged to have been paid by him as claimed by the Plaintiff, the Suit be decided in accordance with law after recording of the evidence. However the claim as to specific performance stands declined as above and not open to adjudication.

Judge

Judge

Barkat Ali, PA