

IN THE HIGH COURT OF SINDH AT HYDERABAD

R.A.No.274 of 2021 : Ameer Ali & Others vs.
Feroze Golwala & Others

For the applicants : Mr. Mushtaq Hussain Khaskheli,
Advocate

For the respondent/s : Mr. Irfan Ahmed Qureshi, Advocate

For official respondent/s : Mr. Muhammad Sharif Solangi, A.A.G

Date/s of hearing : 13.12.2023

Date of announcement : 13.12.2023

ORDER

Agha Faisal, J. Briefly stated, F.C. Suit 26 of 2020 for specific performance of contract and order was passed therein directing the applicant to pay the sale consideration, however, despite specific orders the same was not deposited. Resultantly, vide order dated 24.03.2021, the Senior Civil Judge-III, Shaheed Benazirabad was pleased to dismiss the suit. It is considered illustrative to reproduce the contents of the order herein below:

“Case called. Plaintiff No.1(a) being Attorney of other LRs of plaintiff Ameer Ali and his counsel are present. Learned counsel for defendant No.1 & 2 is present and contended that 1st Senior Civil Judge has passed an order dated 30.11.2019 wherein the plaintiff was directed to pay balance sale consideration of Rs.100,00,000/- with Nazir of this Court on next date of hearing, against that order plaintiff has filed Civil Revision Application No.01/2020 and same was withdrawn by him. He also filed application U/S 151 CPC same was dismissed by this Court vide order dated 14.12.2020. He also filed Civil Revision Application No.26/2020 against that order and same was also dismissed on 03.03.2021 by Honourable 4th Additional District & Session Judge, Shaheed Benazirabad. He contended since plaintiff has failed to deposit the amount, as per direction, therefore, suit of plaintiff may be dismissed for non-compliance.

From perusal of record shows that after order, plaintiff filed transfer application before Honourable District Judge, Shaheed Benazirabad and matter was transfer from 1st Senior Civil Court to this Court on dated 24.02.2020. It is also matter of record that plaintiff has also challenged the said order passed by 1st Senior Civil Judge on dated 30.11.2019, but later on he had withdrawn from Civil Revision and that order has attained the finality. It is also matter of record that plaintiff has filed application u/s 151 CPC for grant of time for depositing consideration amount but same was also dismissed by this Court vide order dated 14.12.2020. Aggrieved from this order, plaintiff filed Civil Revision Application against order but same was also dismissed by Honourable 4th Additional District Judge, Shaheed Benazirabad vide order dated 03.03.2021. Plaintiff till today has not complied the order dated 30.11.2019 and today plaintiff along with his counsel was

present and he was directed to made compliance of order but he fail to do so. The Plaintiff has filed this suit for specific performance of agreement and it is always presumed that plaintiff is ready to perform his part, but the plaintiff who supposed to fulfill his obligations as primary duty has badly failed to comply with the order dated 30-11-2019 passed by 1st Senior Civil Judge. In case of Muhammad Javed & another v. Syed Aftab Ali Naqvi & others reported in [2019 CLC 1678] wherein the Honorable Apex Court has held as under:

Specific Relief Act (i of 1877)--

--S.12.....Suit for Specific Performance of agreement to sell--Non-deposit of balance sale consideration in the Court--effect--Defendants got recorded their statement that if plaintiffs did not deposit the balance sale consideration in the Court they would have no objection on decree of present suit-- Trial Court directed the plaintiffs to deposit remaining sale consideration in the court but they failed and suit was dismissed--validity--Mere fact that plaintiffs had not deposited the balance sale consideration despite order of the trial Court had disentitled them from any discretionary relief-Plaintiffs failure to deposit the balance sale consideration, inspite of defendants, statement that plaintiffs suit might be decreed upon deposit of balance sale consideration had stripped them from all bona fides. Appeal was dismissed in circumstances.

In the case of Haji Abdul Hameed Khan v. Ghulam Rabbani (2003 SC&IR 953) it was held by Honorable Supreme Court of Pakistan that where the plaintiff in a suit for specific performance of an agreement to sell does not deposit the balance sale consideration amount within the time fixed by the trial Court the suit was liable to be dismissed. Furthermore, it was held that a plaintiff seeking the equitable remedy of specific performance must always be ready in willing to perform his part of the contract. If the plaintiff does not deposit the balance sale consideration amount within the time 'stipulated by trial Court the presumption would be that the plaintiff was not serious in prosecuting his remedy.

In the case of Adil Tiwana & others v. Shaukat Ullah Khan Bangash (2015 SCMR 828) it was held by Honorable Supreme Court of Pakistan that the plaintiff had failed to pay the balance sale consideration within the period specified in the agreement to sell. Even when the suit for specific performance was filed, the plaintiff did not seek to deposit the balance sale consideration in the Court. The direction of the trial Court to the plaintiff to deposit defense saving certificates for an amount equal to the balance sale consideration within a period on one month was also not complied with by the plaintiff. In the ultimate analysis the plaintiff had failed to comply with the order /directions of the trial Court despite several opportunities. In such circumstances, the plaintiff's suit for specific performance was held to have been correctly dismissed.

I lay my hands on latest Judgment of Honourable Supreme Court reported in 2020 S.CMR 171 as under:-

"Section 12. Suit for specific performance of agreement to sell---Pre requisites---Deposit of sale consideration in Court---Party seeking specific performance of an agreement to sale was essentially required to deposit sale consideration amount in Court---By maing such a deposit the plaintiff demonstrated its capability, readiness and willingness to perform its party of contract, which was an essential pre-requisite to seek specific performance of contract-- Failure of plaintiff to

meet the said essential requirements disentitled him to the relief of specific performance, which undoubtedly was the discretionary relief”.

I also relied upon recently case laws reported in 2017 SCMR 2022 2017 SCMR 516, 2002 YLR 3815 & 2004 CLD 343.

In view of the above discussion, the suit of plaintiff is dismissed for Non-compliance of order dated 30-11-2019 along-with listed applications, with no order as to cost.”

Thereafter, Miscellaneous Civil Appeal 03 of 2021 was filed before the 4th Additional District Judge, Shaheed Benazirabad and the same was dismissed vide order dated 03.11.2021. The operative part is reproduced herein below:

“Heard learned counsel for both the sides at some length and perused the record in order appreciate their respective contentions.

From perusal of the record, it has been spelt out that appellants (plaintiffs) have filed instant F.C. Suit against respondents (defendants) for Specific Performance of the sale agreement dated: 28-03-2009, before learned trial court. Record also reveals that after institution of the suit, learned trial court vide order dated: 30-11-2019, has directed the appellants (plaintiffs) to deposit the balance sale consideration amount of Rs.100,00,000/= on next date of hearing viz. 06-01-2020, without fail, but the appellants (plaintiffs) instead to obey the orders of the learned trial court while using the delaying tactics have filed Civil Revision No. 01/2020, subsequently, the same was withdrawn by them, thereafter, they have filed an application u/s 151 CPC before learned trial court for grant of time to deposit the balance sale consideration amount, thus, the same was dismissed by the trial court vide order dated 14-12-2020. The appellants (plaintiffs) again assailed the said order in Civil Revision 26/2020, which was also dismissed by this court on 03-03-2021. After passing of order in Civil Revision No.26/2020, appellants (plaintiffs) were required to fulfill the order of the trial court, but appellants (plaintiffs) have failed to do so till passing of impugned order dated: 24-03-2021. It is matter of record that learned trial court has passed the order to deposit the balance sale consideration amount on 30-11-2019, and this Court has dismissed the Civil Revision of the appellants (plaintiffs) on 03-03-2021, and trial court has dismissed the suit of the appellants (plaintiffs) vide impugned order on 24-03-2021, as such about 02 years have been completed but the appellants (plaintiffs) have failed to comply with the orders of the trial court though sufficient time and opportunities were provided to them, which clearly indicate that the appellants (plaintiffs) were/are not ready to perform their part of contract as well as they were/are not ready to comply with the directions of learned trial court. Furthermore, it is obligatory duty and requirement for suit of specific performance of the agreement that party approaching to the court must deposit the balance sale consideration amount at first instance before the court to show his/her seriousness. Moreover, in a suit of specific performance court is also empowered to issue directions to plaintiff to deposit balance consideration amount in order to show his/her seriousness, preparedness and readiness, so, appellants (plaintiffs) were duty bound to comply with the order of the learned trial court in its letter and spirit and they were required to deposit the balance sale consideration amount within stipulated time but they have failed to do. It is also settled connotation of law and same has also been held many times by Honourable August Court of Pakistan that in a suit for specific performance, it is always mandatory principle that the plaintiff seeking equitable remedy of specific performance must be always willing and ready to perform his part of contract. But, where the

plaintiff has failed to deposit the sale consideration amount within the time stipulated by the court, the presumption would be that the plaintiff was not serious in prosecuting his remedy and the suit was liable to be dismissed. Reliance is respectfully submitted on case laws reported in 2020 SCMR 171, 2017 SCMR 2022, 2015 SCMR 828 and 2003 SCMR 953.

For the reasons discussed above, I am of the considered view that, from the record as well as arguments advanced by the learned counsel, appellants cannot seek aid of this Court. The appellants have failed to comply with the terms and condition of the contract as well as failed to comply the specific directions of the learned trial court, despite passing of period of about (02) years. As a result of above discussion, I have reached to the conclusion that that learned counsel for appellants have failed to point out any illegality or impropriety in the impugned order. Thus, the order passed by the learned trial court does not call for any interference by this court in its appellate jurisdiction and same is maintained accordingly. Consequently, the present Misc. Civil Appeal has no force and the same is hereby dismissed. There shall however be no order as costs. Since the Misc. Civil Appeal has been disposed of, therefore, the pending application (s) if any also become infructuous.

With utmost respect to the case law cited by the learned counsel for appellants which in view of the above discussion the findings thereof are found not applicable to the present case.”

Learned counsel for the applicants submits that due to events that transpired post execution of the underlying agreement, the entire complexion of the suit had changed, therefore, it was not proper for the applicants to be required to deposit the balance sale consideration. Learned counsel for the private respondent controverts the arguments and submits that the impugned orders are in accordance with law and warrant no interference in revision. The learned A.A.G supports the impugned orders and adopts the arguments advanced by the learned counsel for the private respondent.

Heard and perused. The law with regard to deposit of sale consideration and the consequence of default in such regard is well settled. The Supreme Court maintained in the *Hamood Mehmood case*¹ as follows:

“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.”

The matter was recently revisited by the Supreme Court in the *DW Pakistan case*² wherein the primacy of deposit of the balance consideration and the consequence for default in such regard was recognized, albeit with additional observations.

It is *admitted* that an order was rendered by the trial court on 30.11.2019 directing the present applicants to deposit the sale consideration. The uncontroverted record demonstrates that a revision was preferred against the said order but the same was dismissed as withdrawn; an application per section 151 C.P.C was then filed to extend the time but the same was

¹ Per *Dost Muhammad Khan J.* in *Hamood Mehmood vs. Mst. Shabana Ishaque & Others* reported as 2017 SCMR 2022.

² Per *Muhammad Ali Mazhar J.* in *DW Pakistan (Private) Limited vs. Begum Anisa Fazli Mahmood & Others* reported as 2023 SCMR 555.

dismissed vide order dated 14.12.2020; Civil Revision 26 of 2020, assailing the dismissal order, was dismissed vide order dated 03.03.2021; and eventually the suit was dismissed on 24.03.2021. The appellate court found no reason to interfere in the dismissal order, predicated upon the *admitted and subsisting default of the applicants*, and was pleased to dismiss the appeal vide order dated 03.11.2021.

The narrative contained in the respective orders impugned has not been controverted before this Court and the learned counsel made no endeavor to demonstrate that the respective findings could not be rested upon the rationale / law relied upon. Under such circumstances, no case is made out to warrant any interference in the impugned orders.

Notwithstanding the foregoing, applicants' learned counsel was unable to cite a single ground based upon which the jurisdiction of this Court could be exercised under section 115 of Code of Civil Procedure. There is no suggestion that either impugned order is either an exercise without jurisdiction or a failure to exercise jurisdiction or an act in exercise of jurisdiction illegally or with any material irregularity.

In view hereof, this revision is found to be misconceived and devoid of merit, hence, hereby dismissed along with listed applications.

Judge

Ahmed/Pa,