

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Abdul Mubeen Lakho

High Court Appeal No. 194 of 2020

Appellant: Zeeshan Pervez
through M/s Haad A. M. Pagganwala &
Jahanzeb Baloch, advocate.

Respondent: Muhammad Nasir
through Mr. Muhammad Vawda, advocate.

Date of Hearing: 24.05.2022.

Date of Short Order: 24.05.2022.

J U D G M E N T

AQEEL AHMED ABBASI, J ; - Instant High Court Appeal has been filed against common judgment dated 31.08.2020 and decree dated 15.09.2020 passed by the learned Single Judge in Suit Nos.1114 of 2013 filed by appellant for rescission of contract and cancellation of the said instrument and Suit No.1214 of 2013 filed by the respondent for specific performance, mandatory, perpetual injunction and damages, whereby, Suit No.1114/2013 has been dismissed, whereas, Suit No.1214/2013 has been decreed in favour of the respondent in the following terms:-

“29. The Vendee has made out a fit case for grant of specific performance of the Agreement, whereas, the Vendor has been unable to demonstrate and / or prove any grounds to merit cancellation thereof. Therefore, Suit 1214 of 2013 is decreed, with costs, in favor of the plaintiff with directions to the defendant to forthwith execute a conveyance deed in favour of the plaintiff with respect to the Suit Property and deliver peaceful vacant possession thereof. The balance sale consideration, being

Rs.19,035,000/-, and profit accrued thereon, may be paid by the Nazir to the defendant upon execution of conveyance deed and delivery of the Suit Property to the plaintiff. The excess amount deposited with the Nazir, being Rs.765,000/- and profit accrued thereon, shall be returned to the plaintiff. Suit 1114 of 2013 is hereby dismissed with costs.”

2. Briefly the facts as recorded by the learned Single Judge in the impugned judgment and decree are that the parties to the abovementioned suits admittedly executed an agreement for sale in respect of plot of land bearing No. 72/III, measuring 550 square yards or thereabouts, 16th Lane, Phase VII, DHA, Karachi, alongwith bungalow/construction thereon. Suit No.1114 of 2013 was filed by the vendor seeking cancellation of the agreement on the premise that the vendee was unable to pay the requisite amounts within the stipulated time, whereas, Suit No.1214 of 2013 was filed by the vendee, soon thereafter seeking specific performance of the agreement, wherein, it has been pleaded that the vendor was unlawfully seeking to renege from his binding obligations pursuant thereunder. In this context, it is considered appropriate to reproduce the pertinent and pivotal content of the agreement herein below:-

“ *This Agreement to Sell is made at Karachi, this 26 day of March 2013.*

1. *That the Vendor has received from the Vendee a sum of Rs.2,00,000/- (Rupees Two Lac only) through Cheque No.0041740420 dated 22/03/2013 drawn on Faysal Bank Ltd, Karachi, and now on signing of this Agreement a further sum of Rs.23,85,000/- (Rupees Twenty Three Lac Eighty Five Thousand only) THROUGH No.01700373 Rs.1,900,000/- FBL H.O. 0041740422 Rs.4,85,000/- FBL H.O. both the sums totaling to Rs.25,85,000/- (Rupees Twenty Five Lac Eighty Thousand only) being the advance part-payment towards sale consideration of the said property, receipt of which the Vendor doth hereby fully admit and acknowledge separately.*

2. That a further sum of Rs.34,15,000/- (Rupees Thirty Four Lac Fifty Thousand only) shall be paid by the Vendee to the Vendor on or before March 20, 2013 and balance payment of Rs. 1,98,50,000/- (Rupees One Crore Ninety Eight Lac Fifty Thousand only) shall be paid by the Vendee to the Vendor at the time of handing over the vacant and peaceful physical possession of the said property and completion of sale formalities including registration of Sale Deed/General Power of Attorney in favour of the Vendee or his nominee(s) on or before 15/08/2013....

4. That after the payment of Rs.34,15,000/- the Vendor shall be responsible to full pay off the debt/loan against the said property and obtain the Clearance Certificate/NOC from the Bank concerned.”

3. After the exchange of pleadings, the following consolidated issues were framed for determination:-

“1. Whether the plaintiff in Suit No. 1214 of 2013 is entitled for specific performance of the agreement relied upon?

2. Whether time is essence of the agreement?

3. Whether is the balance amount outstanding out of the total sale consideration?

4. What should the decree be?”

4. Perusal of the impugned judgment and decree shows that the learned Single Judge after scrutiny of the facts and the evidence produced by the parties has given his decision on the abovementioned issues in Para: 29 of the impugned judgment in the following terms:-

“29. The Vendee has made out a fit case for grant of specific performance of the Agreement, whereas, the Vendor has been unable to demonstrate and/or prove any grounds to merit cancellation thereof. Therefore, Suit 1214 of 2013 is decreed, with costs, in favour of the plaintiff with directions to the defendant to forthwith execute an conveyance deed in favour of the plaintiff with respect to the Suit Property and deliver peaceful vacant possession thereof. The balance sale consideration, being Rs.19,035,000/-, and profit accrued thereon, conveyance deed and delivery of the Suit

Property to the plaintiff. The excess amount deposited with the Nazir, being Rs.765,000/-, and profit accrued thereon, shall be returned to the plaintiff. Suit 1114 of 2013 is hereby dismissed with costs.”

5. During pendency of instant High Court Appeal, since the appellant has expired, therefore, amended title was filed while bringing the legal heirs of the appellant on record, who have thereafter, continued to proceed in the instant High Court Appeal. Learned counsel for the appellant, after having readout the impugned Judgment and decree, has argued that the learned Single Judge, while passing the impugned judgment and decree has misread the evidence produced by the parties, as according to learned counsel, the respondent did not make payment of the balance amount of sale consideration in respect of subject property on or before 15th August 2013 as per the term of the agreement, therefore, not was entitled to seek any relief of specific performance. It has been further contended by the learned counsel for the appellant that since the respondent failed to discharge to onus of proof to the effect that respondent was ready and willing to make payment of the balance amount of sale consideration within the stipulated period, therefore, directions issued by the learned Single Judge, while passing the impugned judgment and decree, requiring the appellant to forthwith execute conveyance deed in favour of the respondent and to deliver peaceful vacant possession of the subject property is erroneous in law and facts of the case, therefore, the impugned judgment and decree is liable to be sat-aside and the suit filed by the respondent seeking specific performance of the agreement is equally liable to be dismissed.

6. Conversely, learned counsel for the respondent vehemently opposed the contention of the learned counsel for the appellant and

submits that the appellant has miserably failed to point out any factual error or legal infirmity in the impugned judgment and decree passed by the learned Single Judge in the instant case, whereas, according to learned counsel, respondent has successfully discharged the onus of proof to seek a declaration with regard to specific performance of the contract in respect of subject property. It has been submitted by the learned counsel that the impugned judgment and decree passed by the learned Single Judge in the instant matter does not require any interference by this Court in the instant High Court Appeal. Moreover, according to learned counsel for the respondent, the appellant has failed to make out a prima-facie case before the learned Single Judge or before this Court, seeking cancellation of the registered document, whereas, no evidence or material has been placed on the record to establish that respondent has committed any default or violated the terms of the agreement, therefore, plea of the appellant to this effect, seeking cancellation of a registered document has been rightly rejected by the learned Single Judge through well-reasoned impugned judgment and decree. It has been further contended by the learned counsel for the respondent that instant High Court Appeal having no merits, whereas, no case for interference by this court in the impugned judgment and decree has been made out, which otherwise is based on proper reading of evidence and sound reasoning, therefore, instant High Court Appeal is liable to be dismissed.

7. We have heard the learned counsel for the parties, perused the record and have also gone through the impugned judgment and decree with their assistance.

8. Since the execution of sale agreement executed between the parties for the sale/purchase of the Plot of Land/Property bearing No.72/III, measuring 550 square yards or thereabouts situated on 16th

Lane, Phase-VII, DHA, Karachi alongwith bungalow constructed thereon, is not disputed, nor the payment made by the vendee to the vendor through cheques are also admitted, therefore, we would examine the legal issue involved in the instant High Court Appeal in the light of the evidence available on record as well as the conduct of the parties towards the fulfillment of their obligations pursuant to the sale agreement dated 26.03.2013. Perusal of the impugned judgment shows that the fate of both the suits filed by the parties has been determined by the learned Single Judge through impugned judgment and decree mainly while interpreting the relevant terms of sale agreement dated 26.03.2013 while framing consolidated issues as referred in Para 3 hereinabove. The case of the appellant before the learned Single Judge as well as before this Court mainly revolves around two grounds for seeking cancellation of sale agreement and dismissal of the suit of specific performance filed by the respondent; firstly that the sale agreement has already been cancelled by mutual consent and secondly the sale agreement must be cancelled, as the vendee has failed to make payment of balance sale consideration within stipulated time, as according to appellant, the time was the essence of the sale agreement. The first ground regarding alleged cancellation of the sale agreement has been dealt with by the learned Single Judge in detailed in the impugned judgment in the following terms: -

“9. The primary argument is that the Agreement was cancelled, hence, the question of its specific performance does not arise. The record demonstrates that the Vendor had addressed a legal notice 15 to the Vendee dated 02.09.2013, being precisely two days prior to the institution of Suit 1114 of 2013 by the Vendor. The notice stipulates that since a sum of Rs. 3,415,000/- was not paid prior to 20.03.2013 and the balance sale consideration was not paid by 15.08.2018, as required per clause 2 of the Agreement, therefore, the said Agreement is "hereby" rescinded.

10. *The plaint filed by the Vendor, in Suit 1114 of 2013, on 04.09.2013, two days since the aforementioned legal notice, prays 17 inter alia for recession and cancellation of the Agreement on the specified plea that Vendee had not performed his aforementioned contractual payment obligation/s within time.*

11. *It is imperative to bear in mind at this juncture that the Vendee also filed Suit 1214 of 2013, for specific performance of the Agreement, on 27.09.2013 and was granted interim relief, restraining the Vendor from creating any third party interest in the Suit Property and from parting with possession thereof, on the very date itself. The interim orders continued throughout the tenure of the suits and subsist till date. It is in this context that the Vendee's categorical denial of any mutually agreed cancellation must be considered.*

12. *In a complete departure from his pleadings, as particularized supra, the Vendor deposed in his evidence¹⁸ that the Agreement has already been cancelled. This novel plea, completely alien to the pleadings, remained a bare assertion devoid of any corroboration from the record. Vendor's counsel was specifically asked as to whether any positive evidence was adduced to support this claim and the counsel responded in the negative.”*

9. Learned counsel for the appellant during course of hearing was confronted by this Court as to whether the findings as recorded by the learned Single Judge regarding alleged cancellation of sale agreement is erroneous in facts and law, however, learned counsel for the appellant could not submit any response to such query, nor could refer to any material or evidence to support such ground as agitated by the appellant before the learned Single Judge as well as before this Court, therefore, no case is made out for interference with hereinabove findings of the learned Single Judge on this effect.

10. As regard the second ground as agitated by the appellant before the learned Single Judge as well as before this Court relating to interpretation of the relevant provisions of the sale agreement with

particular reference to alleged default by the respondent towards the fulfillment of the contractual obligations i.e. making payment of balance sale consideration within stipulated time has been observed that the learned Single Judge after having taken stock of all the material and the evidence produced by the parties has decided this issue elaborately through impugned judgment in the following terms: -

“18. The Agreement is dated 26.03.2013 and records the payments that have already been made thereunder, until the date of execution, in clause 1 thereof. The Agreement specifically mentions three instruments, particularized therein, and the same is also corroborated by the certification²¹ of Faysal Bank Limited available in evidence. Clause 2 then says that "That a further sum of shall be paid. on or before Marach (sic) 20,2013'. It is prima facie apparent that the amount in contemplation is an amount to be paid post execution of the Agreement.

The evidence denotes that the Vendor accepted 2 payments from the Vendee post execution of the Agreement, vide pay orders dated 11.04.2013 and 20.05.2013, demonstrably realized per the admission of the Vendor's counsel and the bank statement²³.

There is nothing on the record to show any attempt by the Vendor to point out to the Vendee that payment/s, purportedly due by 30.03.2013, have not been received in time. On the contrary the Vendor demonstrably and admittedly received and realized the relevant payment in the third week of May 2013.

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22. At the time of execution of the Agreement, the Suit Property was admittedly mortgaged by the Vendor with Summit Bank Limited. The redemption of this mortgage had to be done prior to consummation of the transfer and in such regard clause 4 of the Agreement required that "after the payment of Rs.34, 15,000/- the Vendor shall be responsible to full (sic) pay off the debt/ loan against the said property and obtain the Clearance Certificate/NOC from the Bank concerned". It would thus be safe to observe that the conveyance could only take place once the relevant mortgage was redeemed and that obligation rested squarely upon the Vendor.

The evidence has on record an excerpt from the Board of Revenue Deed Management System²⁶ that demonstrates that the mortgage upon the Suit Property remained intact until 09.09.2013. No cavil was advanced by the Vendor / learned counsel to disprove and / or dispel this factum. It would thus appear that on the specified date, being 15.08.2013, the Suit Property remained under mortgage.

23. The Agreement specifies that the balance sale consideration was to be paid "at the time of handing over the vacant and peaceful physical possession of the said property and completion of sale formalities including registration of Sale Deed...". The instrument also expresses, per clause 4, that the Vendor shall be required pay his loan and redeem the mortgage upon the Suit Property. It would thus follow that since the mortgage was admittedly not redeemed by the Vendor prior to 15.08.2013, hence, the predefined requisites for the conveyance were never satisfied. It is also noted that even upon the date upon which the legal notice was issued and / or Suit 1114 of 2013 was instituted, by the Vendor, the Suit Property remained under mortgage. Since the requirement of payment of the balance sale consideration was always contingent upon completion of the aforementioned requisites, therefore, there appears to have been no occasion for the Vendee to make payment of the balance sale consideration on the said date.

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26. The Agreement denotes that the total sale consideration amounted to Rs. 25,850,000/-. The Vendee pleaded having made five distinct payments to the Vendor and upon being confronted in respect thereof during his cross examination, Exhibit 5, the Vendor admitted receipt thereof unequivocally. The Vendee has adduced a statement²⁹ issued by Faysal Bank Limited wherein it has been certified that five payments were made by the Vendee to the benefit of the Vendor, vide five distinct and identified instruments³⁰, and the total quantum thereof amounts to Rs. 6,815,000/-. It may be pertinent to mention that during the course of the final arguments the learned counsel for the Vendor confirmed that the Vendee had in fact received the aforementioned sums vide the particularized instruments. The balance sale consideration amounted to Rs. 19,035,000/-, however, the amount deposited by the Vendee in Court is in excess thereof, being 19,800,000/- . It would thus follow that the Vendee has deposited an excess

amount equaling Rs. 765,000/-. It is also poignant to note that the Vendor's counsel did not controvert the aforementioned factum during final arguments."

11. From perusal of the hereinabove findings as recorded by the learned Single Judge through impugned judgment on the issue as to whether the time was the essence of the agreement, clearly reflects that the time was not essence of the agreement, as initial date being 20.03.2013, was admittedly and inadvertently misprint, whereas, second date being 15.08.2013, was demonstrable contingent upon discharge of the vendor's obligations as per Clause 4 of the agreement. Prima facie, there is no material or evidence to demonstrate that there was any default on the part of the respondent, nor the learned counsel for the appellant could refer to any such material or evidence, which may require this Court to interfere with the findings of the learned Single Judge on this legal issue, which has been decided by the learned Single Judge after proper appraisal of evidence and correct interpretation of the terms of sale agreement in accordance with law. There is no cavil to the proposition that the specific performance of an agreement is discretionary relief, which depends primarily on the terms of the agreement as well as the conduct of the parties, whereas, in the instant case it has been transpired that the respondent has been able to discharge his onus to prove that the respondent was always ready and willing to make payment of balance sale consideration and discharge of his contractual obligations, however, subject to fulfillment of the appellant's obligations as per Para 4 of the agreement, therefore, the learned Single Judge has rightly decided this legal issue in favour of the respondent while holding that vendee (respondent) has made out a fit case for grant of specific performance, whereas, vendor (appellant) has not been unable to demonstrate and/or prove any ground for seeking cancellation of the sale agreement and resultantly Suit No.1214/2013

filed by the respondent seeking specific performance of the agreement has been decreed with costs and Suit No.1114/2013 filed by the appellant seeking cancellation of the agreement has been dismissed with costs.

12. In view of hereinabove facts and circumstances of the instant case, we are of the considered view that the appellant has failed to make out a case requiring this Court to interfere with the impugned judgment and decree passed by the learned Single Judge, which prima facie does not suffer from any factual error or legal infirmity, whereas, the findings as recorded by the learned Single Judge are based on proper reading of the evidence produced by the parties in both the suits and correct interpretation of the terms of the sale agreement. Accordingly, instant High Court Appeal was dismissed vide our short order dated 24.05.2022 and above are the reasons of such short order.

JUDGE

JUDGE

Shakoor/Nadeem/Farhan