

**IN THE HIGH COURT OF SINDH AT KARACHI****High Court Appeal No. 132 of 2018**

Present:

Mr. Justice Muhammad Shafi Siddiqui

Mr. Justice Omar Sial

**Muhammad Shafiq Qureshi** ..... **Appellant**

through Syed Ehsan Raza, Advocate

vs.

**Dr. Arifa Akram** ..... **Respondent**

through Mr. Muhammad Safdar, Advocate

Date of hearing: 14.02.2024

Date of short order: 14.02.2024

Date of reasons: 20.02.2024

**JUDGMENT**

**OMAR SIAL, J.** Dr Arifa Akram agreed to sell House No. 154/1 on Khayaban-e-Hafiz in DHA Phase 6, Karachi, to Mohammad Shafiq Qureshi. The two individuals executed an agreement on 27.11.2002 to record the terms of the sale. The sale price was fixed at Rs. 6,500,000, and Rs. 650,000 was given as advance money, whereas the balance amount was to be paid at the time of registration of the sale deed by or before 30.01.2003. It is a matter of record that the sale was never consummated, and as a consequence, the advance money was forfeited, and Dr Arifa Akram cancelled the agreement.

2. On 2.12.2004, Mohammad Shafiq Qureshi filed Suit No. 1359 of 2004, seeking the performance of the agreement to sell. On 07.12.2004, Dr Arifa Akram filed Suit No. 1372 of 2004 for declaration, cancellation and permanent injunction. Both suits were consolidated, and a common judgment dated 12.04.2018 was passed. Suit No. 1359 of 2004 was dismissed, while Suit No. 1372 was decreed in favour of Dr Arifa Akram. Qureshi has challenged the judgment through this appeal.

3. Learned counsel for Qureshi has argued that no notice was issued to him by Arifa informing him that the agreement to sell was being cancelled and the advance money was forfeited. He said this violated section 55 of the Contract Act of 1872. He secondly argued that Qureshi was able and willing to complete the sale, but it was Arifa who delayed matters by not providing a copy of the title documents to the property. Lastly, he submitted that the impugned judgment is silent on the fate of the Rs. 650,000 advance money. We have heard both counsels and perused the record. Our observations and findings are as follows.

4. The record shows that a notice inviting objections to the sale was published by Qureshi on 11.01.2003 and that till the deadline had expired, no objection was received. In the affidavit-in-evidence which Qureshi swore, he claimed that he was able and willing to complete the transaction but that Arifa was delaying things. To prove his argument, he put on record at trial a copy of a legal notice dated 29.01.2003 (that is, one day before the time given in the agreement to sell passed) sent to Arifa by his legal counsel. It has been disputed by Arifa that the said legal notice was ever sent to her. We have scrutinized the legal notice dated 29.01.2003 and are surprised to see that the original legal notice had been exhibited at trial. It was not explained as to how Qureshi himself was in possession of the original copy when it was claimed that the legal notice had been sent to Arifa. This ambiguity could have been cleared had the counsel who ostensibly issued the notice had been examined as a witness. This was however not done. Another ambiguity which we notice is that that receipt of delivery of the legal notice (ostensibly issued by TCS does not give the address of either the sender or the recipient. Qureshi acknowledged at trial that an incomplete address appears on the receipt. He also expressed his inability to produce the original delivery receipt. At trial Qureshi while asserting that he was ready and willing to pay the money before the deadline, acknowledged that "it is correct that we have not placed any proof to show that on 30.01.2003, I had the balance amount available with me in my bank account.". He went on to also admit that "It is correct that I have not submitted any document, i.e. draft of the conveyance deed to

show that on 30.01.2003 I was ready for the purchase of the property.” We also find it surprising that in spite of Qureshi claiming that he was ready and willing to complete the transaction within the time frame given in the agreement, he never tried to contact Arifa from 30.01.2003 till the date he filed the suit a year later – in his cross-examination he stated ‘It is correct that I could not contact the defendant from 30.01.2003 till the filing of the suit, but I made my best effort.’ We do not find his statement logical or plausible that all his efforts to meet Arifa were unsuccessful. Arshad Shahbaz was the estate agent who brokered the deal. He appeared as Qureshi’s witness at trial, but even he admitted, ‘It is correct that I was not shown any pay order by the plaintiff to show that he was ready for making the final payment.’ The onus of proving that he was willing and able to conclude the transaction by or before 30.01.2003 was on Qureshi. He had to show through evidence that either funds were available with him or that a pay order was prepared. During the hearing of this appeal too, learned counsel could not discharge that burden. He could also not explain that even if Qureshi’s version was true, why did it take him another 23 months to file a suit for specific performance? The learned counsel argued that the transaction could not be completed due to Arifa Akram not giving Qureshi a ‘copy of the title document’; yet, he was unable to provide a satisfactory response to how he could agree to buy property, which he did not know even belonged to the seller. Had he not conducted any due diligence? It is also pertinent to note that in the legal notice allegedly sent by Qureshi to Arifa on 29.01.2003, there is no mention that she was not providing a copy of the title document to Qureshi. On the contrary, the reason given in the notice is that Arifa is declining to accept payment. Even then, no effort was made by Qureshi to promptly file a suit and deposit the balance of the sale consideration in court. Based on the evidence led at trial, we agree with the learned Single Judge that Qureshi failed to prove that he was willing and able to conclude the deal on or before 30.01.2003. Time was the essence of the agreement. Since default was on the part of the appellant, he could not claim the discretionary relief of specific performance.

5. With much respect to the learned counsel for the appellant, we see no applicability of section 55 of the Contract Act, 1872, in the circumstances of the present case. As regards the Rs. 650,000, which was given as advance money, the learned counsel for the respondent categorically submitted that the amount would be returned to Qureshi. The same was recorded in our short order dated 14.02.2024.

6. Above are the reasons for dismissing the appeals through the short order mentioned in the preceding paragraph.

JUDGE

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