

ORDER SHEET
IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

C. P. No. D –203 of 2024

Date	Order with signature of Judge
	Before: Mr. Justice Muhammad Iqbal Kalhoro Mr. Justice Arbab Ali Hakro
Petitioner:	Zafar Ahmed Shaikh s/o Abdul Hakeem through Mr. Ateeq-ur-Rehman Soomro, Advocate
Respondent No.5:	In person
Respondents No.1 to 4:	Province of Sindh and others through Mr. Ghulam Abbas Kuber, AAG
Date of hearing:	26.03.2024
Date of Order:	24.04.2024

ORDER

ARBAB ALI HAKRO, J: Invoking the jurisdiction of this Court under Article 199 of the Constitution of Pakistan, 1973, the Petitioner has challenged the legality of the Order dated 31.01.2024, passed by the Court of III-Additional District Judge, Sukkur, referred to herein as “**the Revisional Court**”, as well as the Order dated 16.11.2023, passed by the Court of I-Senior Civil Judge, Sukkur, hereinafter referred to as “**the Trial Court**”, whereby the Petitioner was directed to deposit balance sale consideration before trial Court.

2. The brief facts of the case are that the Petitioner instituted a suit for the specific performance of an agreement to sell dated 19.3.2022 against the respondents. The Petitioner stated that he purchased the property bearing No.F-31/38-A, measuring 300-2 Sq. Yds, situated at Barrage Colony, Sukkur (the “**suit property**”), from respondent No.5. The consideration for this purchase was

Rs.17,000,000/-, out of which Rs.2,500,000/- was paid as earnest money. It is averred in the plaint that respondent No.5 requested the Petitioner, at the time of the execution of the agreement to sell, through witnesses Jameel Ahmed and Hazoor Bux @ Abid, to issue cheques for the remaining sale consideration amount of Rs.14,500,000/-. In pursuance of this request, the Petitioner issued five cheques of different dates and handed them over to witness Jameel Ahmed, who is a close friend of respondent No.5, as security. The plaint states that the Petitioner learned that the High Court passed an order that the properties in Barrage Colony cannot be alienated. Upon learning this fact, the Petitioner approached the said witness, Jameel Ahmed, for the return of the cheques, who stated that the cheques had been misplaced. After that, the Petitioner moved an application to the concerned Manager of the Bank to stop the payment and lodged an N.C. at the concerned Police Station. It is also averred that respondent No.5, with malafide intentions and ulterior motives, deposited the cheques in the concerned bank for encashment, which were bounced. Afterwards, the Petitioner approached respondent No.5 for the execution of the Sale Deed in respect of the suit property. The Petitioner is ready to perform his part of the contract by paying the remaining sale consideration amount, but respondent No.5 kept on giving him false hopes. As a result, the Petitioner filed the suit.

3. Respondent No.5 contested the suit and filed a statement that the Petitioner had not deposited the balance consideration at the time of the suit's institution. Therefore, the Petitioner's suit is liable to be dismissed. Upon receiving notice, the Petitioner filed his objections to this statement. After hearing the parties, the trial court, vide Order dated 16.11.2023, directed the Petitioner to deposit the remaining sale consideration before the Court by the next hearing. In case of non-compliance or default, the suit will be dismissed. The Petitioner challenged this Order before the Revisional Court by filing a Revision

Application, which was also dismissed as per the Order dated 31.01.2024.

4. At the very outset, the learned counsel representing the Petitioner contended that both learned lower Courts erroneously passed the impugned orders without applying judicious mind so, also without considering the legal proposition of law, there is no provision of Specific Relief Act, 1877, which pre-requisites vendee to first deposit balance consideration amount for seeking enforcement of agreement; that admittedly Petitioner purchased the suit property by executing sale agreement and has paid part sale consideration amount and he is ready to pay balance consideration amount, but Respondent No.5 with malafide intention is not receiving the balance consideration. Lastly, he prayed that an instant petition may be allowed by setting aside the impugned orders passed by both courts below.

5. Conversely, respondent No.5, appearing in person, has expressed support to the impugned orders, and the reasons for his support are those stated in the orders. He has placed reliance on the case law reported as **2023 SCMR 555, 2022 SCMR 616, 2021 SCMR 686, 2020 SCMR 171 & 2023 CLC 1363.**

6. The learned A.A.G argues that there are concurrent findings of both courts below, and no gross irregularity or infirmity has been pointed out to compel the Court to disturb the findings of the trial Court. In a suit for specific performance of the sale agreement, it is a pre-requisite for the petitioner to perform his part of the contract; hence, he was bound to deposit the remaining sale consideration amount, which he failed to do.

7. We have heard counsel for the parties, have perused the record with their assistance, and have taken guidance from case law submitted by them.

8. In the context of the Specific Relief Act of 1877, it is unequivocally clear that there is no explicit provision requiring the vendee to deposit the remaining sale consideration upon filing the suit for the specific performance of a contract. However, it is crucial to note that the relief of specific performance is discretionary and cannot be claimed as a matter of right. Therefore, the vendee is obligated to assert that he has fulfilled all the conditions as per the agreement he was bound to perform from the date of its execution till filing of the suit. He must demonstrate his readiness and willingness to perform his part of the contract. This readiness and willingness is not merely a statement in the plaint but must also be substantiated through supporting evidence such as a pay order, bank statement or other material. This evidence should unequivocally establish his ability to perform his part, leaving no room for a doubt in the mind of the Court that the proceedings seeking specific performance have not been initiated to cover up his default or to gain time to generate resources.

9. In this context, the Court, in order to assess his capacity to perform his intention to purchase, may direct the vendee to deposit the balance sale consideration. The readiness and willingness on the part of the vendee to perform his part of the obligation also prima facie demonstrates that the non-completion of the contract was not the fault of the vendee. The contract would have been completed if the vendor had not renounced it. This assertion underscores the importance of the vendee's role and responsibility in successfully executing the agreement.

10. In the case of Messrs DW Pakistan (Private) Limited, Lahore vs Begum Anisa Fazl-i-Mahmood and others (2023 SCMR 555), the Supreme Court of Pakistan has made a comprehensive discussion on the matter of depositing balance consideration in the Court in a suit for Specific Performance of Contract. The Supreme Court of Pakistan

revisited several of its citations before reaching a conclusion that it is beyond any doubt that in a suit for specific performance of a contract to sell, the Court may order deposit of sale consideration. The act of depositing the amount in the Court not only demonstrates readiness and willingness but also exhibits good faith and bona fide intention. This is subject to the final outcome of the suit on merits, indicating that the vendee was not incapable of performing his part of the contract, at least in terms of payment of sale consideration as per the covenant. This is unless there is a violation of any other essential term of the contract which may debar the relief in terms of Section 24 of the Specific Relief Act of 1877. This aspect can only be thrashed out after leading evidence by the parties. The Court further clarified that the deposit of the sale or balance consideration in the Court is not an automatic requirement. There must be an order of the Court for deposit. When the Trial Court passes the Order for deposit of sale consideration or balance sale consideration, it should also afford some reasonable time to deposit the money in Court for compliance of the Order. The Court should also clarify the consequences of non-compliance of the Order in advance. This ruling provides clear guidelines on depositing balance consideration in the Court in cases of specific performance of a contract to sell. It emphasizes the importance of demonstrating good faith, readiness, and willingness and the need for clear communication from the Court regarding the requirements and consequences. In case of Muhammad Asif Awan v. Dawood Khan and others (2021 SCMR 1270), it was held by the Supreme Court that: *“Besides, it is to be kept in mind that strict non-compliance of the directions of the Court by a vendee to deposit the balance sale price while keeping the lis of specific performance alive has totally different consequence than the cases where the Court while directing the balance price terminates the lis or where the direction to deposit the balance sale price are issued at the instance of the vendor who has shown his readiness to perform his part of the contract. In the first instance, the Court does not lose its jurisdiction to review its order by extending time*

for depositing the balance sale price for the simple reason that the vendee on the face of denial or plea of termination of agreement has only to establish his bona fide/seriousness to standby his part of the commitment, whereas, in the second instance the Court ordinarily becomes functus officio and loses its authority on the lis and consequently has no jurisdiction to extend time for the deposit of the balance sale price”.

11. In this case, the trial Court is tasked with evaluating the bona fide and readiness of the Petitioner, who had pleaded in his plaint that he is prepared to perform his part of the contract by paying the balance consideration. However, respondent No.5 kept the Petitioner on hollow hopes, leading the Court to direct the Petitioner to deposit the balance sale consideration. Instead of complying with this Order, the Petitioner challenged it. However, it is important to note that challenging the Order does not absolve the Petitioner of his equitable burden to establish his readiness and willingness to perform his part of the agreement when seeking specific performance. The Petitioner's actions in this case; absence of an element of readiness and willingness, could be interpreted as an attempt to evade his responsibilities under the contract. This is a crucial point in the legal analysis of this case, as it underscores the importance of the Petitioner's actions in demonstrating his commitment to fulfilling his contractual obligations. The Court's directive to deposit the balance sale consideration was not merely a procedural requirement but a substantive test of the Petitioner's bona fide and readiness to perform his part of the contract.

12. In the realm of contract law, there are numerous instances where, despite the absence of explicit fraud, a contract may lack the requisite equity and fairness for the Court to exercise its extraordinary jurisdiction in specific performance. The Court's assessment of a contract's fairness extends beyond the contract's terms to encompass all surrounding circumstances. This principle is underscored by the

judgments of the Supreme Court of Pakistan in the cases of **Rab Nawaz v. Mustaqeem Khan (1999 SCMR 1362)** and **Muhammad Abdul Rehman Qureshi v. Sagheer Ahmad (2017 SCMR 1696)**. These cases highlight the Court's commitment to ensuring that contracts are not only legally sound but also equitable and fair. In the present case, the Petitioner seeks specific performance of an agreement dated 19.3.2022 for a consideration of Rs.17,000,000/-. This request comes after the Petitioner only paid Rs.2,500,000/- as earnest money. At the same time, the value of the suit property has increased exponentially, and the value of the Rupee has significantly depreciated. Furthermore, the Petitioner has failed to deposit the remaining sale consideration in compliance with the impugned Order dated 16.11.2023. The Petitioner's conduct, in this case, demonstrates a lack of seriousness and willingness to fulfil the contractual obligations. The exercise of jurisdiction in such a scenario may lead to a miscarriage of justice and provide an unfair advantage to the Petitioner. The Petitioner has effectively bound down respondent No.5 for several years by paying only a small amount. This situation underscores the importance of considering all relevant factors and circumstances when assessing the fairness of a contract. It is a well-established principle of law that when a vendor declines to receive the sale consideration, the vendee who seeks specific performance of the contract of sale must deposit the said amount with the court. The vendee is obligated to prove his continuous readiness and willingness to pay the consideration, as well as to provide evidence of the availability of funds. The enforcement of the vendor's reciprocal obligations is contingent upon the vendee's ability to demonstrate not only his willingness but also his capacity to fulfill his contractual duties. This principle is elucidated in the case of **Masood Ahmad Bhatti and another v. Khan Badshah and another (2024 SCMR 168)**.

13. In the case at hand, the trial Court's directive, issued vide impugned Order dated 16.11.2023, unambiguously stated that the

Petitioner/plaintiff's suit would be dismissed if there was a failure to deposit the remaining sale consideration. The decisions of the trial Court upheld by the Revisional Court, which is under scrutiny, align with the principles and essence of the law as articulated by the Supreme Court of Pakistan in the case of Anayat Ullah Khan and others v. Shabbir Ahmad Khan(2021 SCMR 686), wherein it has been held as follows: -

"A person seeking the specific performance of a contract must first show that he is ready, able and willing to perform his obligations under the contract, but this the respondent had failed to do. The law does not require that the balance sale consideration must be tendered or deposited in Court, but such tender/deposit helps establish that the buyer was not at fault. The respondent's learned counsel's contention that only after the Court directs the deposit of the sale consideration, is it to be deposited, is misplaced. We may also take judicial notice of the fact that invariably the value of money depreciates over time and that of land appreciates. Courts adjudicating such cases should not be unmindful of this reality and should endeavor to secure the interest of both parties. In a suit for specific performance of land, if the seller/vendor has refused to receive the sale consideration, or any part thereof, it should be deposited in Court and invested in some government protected security (such as Defence or National Savings Certificates); in case the suit is decreed the seller would receive the value of money which prevailed at the time of the contract and in case of the buyer loses he can similarly retrieve the deposited amount."

14. In the case under consideration, the Petitioner's plea has been unanimously rejected by the two lower courts. Within the purview of writ jurisdiction, the burden of proof rested on the Petitioner to demonstrate that the Orders of the lower Courts were marred by jurisdictional errors or that Courts had exercised their jurisdiction in a manner that was either unlawful or arbitrary. The Petitioner was also required to show that significant irregularities were committed by the lower Courts, which would warrant this Court's intervention under Article 199 of the Constitution of Pakistan. However, the Petitioner was unable to substantiate these assertions before this Court.

15. In light of the preceding discussion, this Court finds no jurisdictional defects or procedural improprieties in the impugned orders passed by the Courts below. Consequently, the invocation of this Court's constitutional jurisdiction is considered inappropriate. The Constitutional Petition, lacking substantive merit, is hereby dismissed. Each party shall bear their own legal expenses.

JUDGE

JUDGE

Faisal Mumtaz /PS