

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

REGULAR FIRST APPEAL NO.76 OF 2017

ADNAN ALI

Versus

MST. BUSHRA AZMAT *and others*

Appellant by : **Mr. Ansar Mehmood Kiani, Advocate.**

Respondent by : **Mr. Khndayar Mohla, Advocate.**
(for Respondent No.1)

Date of hearing : **19-09-2023.**

SAMAN RAFAT IMTIAZ, J.

1. Through this appeal the Appellant [Adnan Ali] has assailed the Judgment and Decree dated 10-03-2017 (“**Impugned Judgment and Decree**”) passed by the learned Civil Judge 1st Class, Islamabad-East (“**Trial Court**”), whereby the Appellant’s Suit for Possession through Specific Performance and Permanent Injunction was dismissed.

2. The necessary facts as per the Memo of Appeal are that the Respondent No.1 [Mst. Bushra Azmat] is lawful owner of the land/house measuring 10 marlas falling in Khewat No.34, Khatooni No.45, Khasra No.1311, situated in Mauza Riharah, Islamabad (“**Suit House**”). The Respondent No.1 entered into an Agreement to Sell dated 18-05-2011 (“**Agreement**”) with the Appellant according to which the total sale consideration was Rs.2,920,000/- out of which the Respondent No.1 received Rs.670,000/- in cash as earnest money and Rs.1,250,000/- in kind in the form of plot measuring 5 Marlas bearing Khewet No. 1078, Khatooni No. 1404, Khara No.3792 situated at Mauza Khand Dak Islamabad (“**Barter Plot**”). It was agreed between the Appellant and the Respondent No.1 that the remaining sale consideration will be paid at the time of transfer of the Suit House and for the completion of the said Agreement time frame of ten days was fixed. Allegedly, the Respondent No.1 received Rs.15,000/- on 19-05-2011 and Rs.150,000/- on 28-05-2011 through her agent namely Amjad Ali. As such, as per the Appellant, the Respondent No.1 has received a total amount of Rs.835,000/-. Allegedly, the Appellant before expiry of the prescribed period repeatedly

asked the Respondent No. 1 to come and receive the remaining sale consideration and to transfer the Suit House in the name of the Appellant but the Respondent No.1 delayed the matter on one pretext or another in order to usurp the earnest money of the Appellant. The Appellant also served a legal notice dated 18-06-2011 whereby he again asked the Respondent No.1 to do the needful but to no avail.

3. Thereafter, the Appellant filed a Suit for Possession through Specific Performance and Permanent Injunction before the learned Trial Court on 29-06-2011. After about two years, the Respondent No.1 also filed a Suit for Declaration, Cancellation of Document Agreement to Sell dated 18-05-2011 and Permanent Injunction. Both the suits were consolidated. From the divergent pleadings, consolidated issues were framed. During the course of evidence the Appellant moved an application for the production of additional evidence i.e. bank statement of the Appellant in order to substantiate his version however, this application was dismissed by the learned Trial Court vide the Order dated 16-09-2016. Thereafter, both the Suits were dismissed vide the Impugned Judgment and Decree, hence the instant appeal.

4. The learned counsel for the Appellant, *inter alia*, contended that the Impugned Judgment and Decree is not sustainable under the law. He highlighted that the learned Trial Court not only dismissed the Suit of the Appellant but also dismissed the Suit of the Respondent No.1, therefore, the agreement between the parties is still alive and the Appellant is entitled for its specific performance under the law. The learned counsel submitted that the Appellant had paid Rs.670,000/- at the time of agreement and Rs. 835,000/- thereafter. Subsequently upon filing of above referred Suit, the Appellant was directed to deposit the balance sale consideration in the Court which was deposited by the Appellant hence the Appellant has already paid the entire sale consideration of the Suit House but this fact has been ignored by the learned Trial Court and the Appellant's suit has been dismissed arbitrarily. The learned counsel for the Appellant relied on *Commissioner Multan Division, Multan and others Vs. Muhammad Hussain and others*, 2015 SCMR 58, *Mst. Talat Shaheen and others Vs. Muhammad Ibrar*, 2012 MLD 216, *Muhammad Aslam vs. Ahmad Hassan*, 2000 YLR 3035, and *Yasin alias Muhammad*

Hussain and 7 others Vs. Muhammad Siddique and 5 others, 1994 CLC 836.

5. On the other hand the learned counsel for the Respondent No.1 submitted that the Appellant has not completed his part of the contractual obligation whereas time was of the essence of the Agreement; that the plot offered by the Appellant as part of payment is not in the name of the Appellant therefore the Appellant is not capable of performing the Agreement. The learned counsel for the Respondent No.1 relied on *Rana Abdul Aleem Khan Vs. Idara National Industrial Co-operative Finance Corporation Defunct through Chairman Punjab Cooperative Board for Liquidation, Lahore and another*, 2016 SCMR 2067 and *Mst. Jewan Bibi and 2 others Vs. Inayat Masih*, 1996 SCMR 1430.

6. The arguments advanced by the learned counsel for the parties have been heard and the record has been examined.

Terms of Agreement

7. The perusal of the Agreement which was produced as Ex.P-1 shows that the Appellant and the Respondent No.1 agreed for the sale and purchase of the Suit House in consideration of the total amount of Rs.2,920,000/- out of which Rs.670,000/- was received by the Respondent No.1 in cash and Rs.1,250,000/- has been received in the form of Barter Plot. It was further agreed that the balance sale consideration would be received by the Respondent No.1 in 10 days and upon receipt thereof the Respondent No.1 will transfer the Suit House in favour of the Appellant or his nominee. The Agreement also provides that in case of breach, the Respondent No.1 shall be liable to pay the Appellant twice the amount received failing which the Appellant would be entitled to file legal proceedings and in case of breach on the part of the Appellant the Respondent No.1 would be entitled to forfeit the amount received. The back side of the Agreement records receipt of Rs.15,000/- on 19-05-2011 and Rs.150,000/- on 28-05-2011 by one named Amjad Ali on behalf of the Respondent No.1 and that the balance amount of Rs.8,350,000/- would be paid at the time of transfer.

Allegation in Subject Suit

8. The Appellant alleged by way of the suit filed by him that before the expiry of the period agreed upon for closing under the Agreement the Appellant time and again asked the Respondent No.1 to perform her obligations and also served legal notice dated 18.06.2011 upon the Respondent No.1 but that the Respondent No.1 lingered on the matter on one pretext or another.

Written Statement

9. The Respondent No.1 filed her written statement in which the main ground that was taken was that the Agreement was prepared by way of fraud and collusion and her signatures were obtained by way of duress/pressure and utmost cunningness without any consideration.

Deposit of Balance Sale Consideration

10. The record reflects that the learned Trial Court allowed the Appellant's application under Order XXXIX, Rules 1 and 2, C.P.C., vide Order dated 21.10.2014 subject to deposit of remaining sale consideration amounting to Rs.2,085,000/-. The Appellant deposited the said amount in court which is evidenced by way of Challan dated 27.10.2014 produced as Ex.P4.

Execution of the Agreement

11. The Appellant who appeared as PW-1 admitted in cross examination that he has never met Respondent No.1 who is a *parda nasheen* lady and that her signature and thumb impression were not affixed on the Agreement in front of him. He claimed that the earnest money amounting to Rs. 670,000/- was given by him to her Husband in cash. He also admitted that the Barter Plot is not in his own name but in his father's name and that the Appellant is ready to have it transferred to the Respondent No.1 although he does not have any power of attorney from the father. Contrary to the plaint filed in the suit, the Appellant also admitted in his examination-in-chief that legal notice was never served upon the Respondent No.1 as she did not receive the same.

12. Examination of the Agreement reveals that it was witnessed by three persons namely, (1) Azmat Khan s/o Ghulam Mustafa (Husband of

Respondent No.1); (2) Raja Javed Rafaqat s/o Raja Lal Khan; and (3) Amjad Ali Khan s/o Mirza Ali Khan (alleged agent of Respondent No. 1).

13. Raja Javed Rafaqat appeared as PW-2 and stated in his examination-in-chief that the Agreement took place in his presence and he confirmed his signature on the Agreement as well as on the back of it. He further stated that he was present when Rs.670,000/- was paid by the Appellant to the Husband of Respondent No.1 i.e. Azmat Khan in the stamp vendor's office and also when Rs.15,000/- was paid to Amjad Ali on 19.05.2011 and Rs.150,000/- on 28.05.2011 on behalf of the Respondent No.1. However, he admitted in cross-examination that Respondent No.1 never appeared before him and that the Husband of the Respondent No.1 got the Agreement signed by her at her house. He further admitted that he is not aware whether the Husband has any power of attorney in his favour from the Respondent No.1 and that Amjad Ali also did not have any power of attorney from the Respondent No.1 at the time of receipt of the aforementioned amounts. He further stated that according to the Agreement Barter Plot was to be transferred at the time of closing and that such plot is not in the name of the Appellant and is actually in the name of the father of the Appellant who was present when the Agreement was prepared although his signature is not on it.

14. The Appellant's father, Liaqat Ali was produced as PW-3 who admitted that Barter Plot is his and that he was and is ready and willing to transfer the same.

15. The third witness to the Agreement i.e., Mr. Amjad Ali who also allegedly received Rs. 15,000/- on 19.05.2011 and Rs. 150,000/- on 28.05.2011 on behalf of the Respondent No. 1 was never produced as witness. The stamp vendor was produced as PW-4.

16. The Husband of the Respondent No.1 was called as PW-5 who admitted and confirmed his signature as witness of the Agreement. He also testified that Respondent No.1 signed the Agreement and affixed her thumb impression in front of him. However, he denied that he received Rs.670,000/- in cash and handed over the same to Respondent No.1.

17. The Respondent No.1 appeared as DW-1 and admitted her signature on the Agreement and that no one made her sign it at gun point rather she signed it by placing her trust in the Appellant. She categorically denied that any earnest money was paid. She also denied that she knows or has any relations with Amjad Ali.

18. The above synopsis of the evidence produced shows that the Agreement was admitted by the Respondent No.1. As per Article 31 of the Qanun-e-Shahdat Order, 1984 admitted facts need not be proved. The Respondent No.1's plea as per her written statement that the Agreement was signed by her due to pressure and duress stood negated by her admission in cross-examination that she did not sign the Agreement at gun point.

Payment of Earnest Money

19. As far as payment of the earnest money is concerned the Agreement records as follows:

"رقم مبلغ چھ لاکھ ستر ہزار روپیہ - 6,70,000/- نقد اور مبلغ بارہ لاکھ
پچاس ہزار روپیہ - 12,50,000/- بشکل پلاٹ برقبہ پانچ مرلہ (0-5)
خسرہ نمبر 3792 موضع کھنہ ڈاک ، اسلام آباد، وصول یا لیے ہیں"
[Emphasis added]

The above clearly means that out of the total sale consideration of Rs.2,920,000/- the Respondent No.1 received Rs.670,000/- in cash and Rs.1,250,000/- in the form of Barter Plot. As observed hereinabove, the Respondent No.1 has admitted the execution of the Agreement and as such normally the veracity of the contents would also stand established. However, it is an admitted fact that contrary to the said position as recorded in the Agreement, the Barter Plot has not been transferred in the name of the Respondent No.1 to date and in fact it is not even in the name of the Appellant but in his father's name.

20. Since the Agreement has incorrectly recorded the transfer of the said Barter Plot to the Respondent No.1, a shadow of doubt is cast upon receipt of cash payment of Rs.670,000/- by the Respondent No.1 as recorded in the Agreement. This is compounded by the fact that the Respondent No.1 denied receipt of any money in her written statement

and to this extent her testimony could not be shattered on cross-examination. Moreover, the Appellant himself testified that he has never met the Respondent No. 1. Instead he claimed that Rs.670,000/- was paid to the husband of Respondent No.1 who however, denied receipt of any amount in his testimony. The foregoing is sufficient to conclude that the Agreement to the extent that it recorded receipt of Rs. 670,000/- by the Respondent No. 1 is factually incorrect.

21. Thus the Appellant was required to establish payment of Rs.670,000/- to the Respondent No.1 through evidence. However, the Appellant was able to produce only one of the two marginal witnesses of the Agreement i.e. PW-2 who confirmed that Rs.670,000/- was paid by the Appellant to the Husband of the Respondent No.1 in his presence. The third witness of the Agreement was not produced before the Trial Court. Although PW-3 who is the Appellant's father also testified that Rs.670,000/- was paid to the Respondent No. 1's husband in front of him but PW-3 is not named as a marginal witness on the Agreement. Even otherwise, admittedly the husband of the Respondent No. 1 was not her attorney and as such had no authority to accept payment on her behalf. In such circumstances, the Appellant failed to establish payment of Rs. 670,000/- to the Respondent No. 1.

22. Similarly, PW-2 confirmed payment of Rs.15,000/- on 19.05.2011 and PW-2 and PW-3 confirmed payment of Rs.150,000/- on 28.05.2011 by the Appellant to one named Amjad Ali. However, the said Amjad Ali who was also witness to the Agreement was not produced. Even otherwise, admittedly the said Amjad Ali did not have any power of attorney in his favour from the Respondent No.1. As such the Appellant was unable to prove payment of earnest money or any part thereof either in cash or in kind to the Respondent No.1 as reflected in the Agreement.

Readiness and Willingness

23. It is correct that generally time is not of essence in respect of agreements pertaining to the sale and purchase of immovable property unless specifically made a condition of the agreement whereas in the instant case no such condition was attached to the transaction expressly in the Agreement. However, the Agreement does provide that in case of the

Appellant's breach the Respondent No.1 would be entitled to forfeit amounts paid, which suggests that time was of essence¹.

24. However, the Appellant was unable to prove that he was ready and willing to perform his portion of the transaction within the time agreed upon as per the Agreement. A vague assertion has been made in the plaint that Respondent No.1 was repeatedly asked to receive the remaining sale consideration but that she lingered on the matter. However, no specific date or time or mode of contacting the Respondent No.1 for closing has been specified in the plaint. The Respondent No.1 denied the said assertion that the Appellant had repeatedly asked her to perform the Agreement by way of her written statement. No question was asked of the Respondent No.1 in cross-examination regarding such allegation. In fact the Appellant admitted in cross-examination that he has never met the Respondent No.1. Therefore the question arises as to how he asked the Respondent No.1 to close the deal as alleged. The purported legal notice dated 18.06.2011 is dated much later than the agreed period of time for closing as per the Agreement and even otherwise it was stated in examination-in-chief that the same was never served as Respondent No.1 did not receive the same. In spite of the foregoing even the purported legal notice was not produced in the evidence and only a marked copy is available which as per settled law has no legal sanctity attached to it.

25. Furthermore, the Appellant failed to deposit the balance sale consideration in Court in a timely manner. In fact the balance sale consideration was not deposited till the learned Trial Court passed stay order subject to such deposit in the year 2014. The wisdom behind requiring deposit of the balance sale consideration by the plaintiff seeking specific performance of an agreement, has been explained in *Muhammad Asif Awan vs. Dawood Khan and others*, 2021 SCMR 1270 as follows:-

“7. Admittedly, unlike section 24 of the Pre-emption Act, which casts a duty upon the Court in a suit for pre-emption to require the plaintiff to deposit in Court 1/3rd of the sale price, **there is no provision in the Specific Relief Act which upon filing of the suit seeking specific performance of an agreement in respect of an immovable property cast any duty on the Court or requires the vendee to first deposit the balance sale consideration**, however, since the law of Specific Relief is based on the principles of equity and further that the relief of specific performance is discretionary and cannot be

¹ *Abdus Salam Khan Barki and another Vs. Mian Pervaiz Akhtar and another*, PLD 2022 Islamabad 346

*claimed as a matter of right, therefore, **the Court in order to ensure the bona fide of the vendee at any stage of the proceedings may put him to terms.***

8. Additionally, section 24(b) of the Specific Relief Act, details the contracts which cannot be specifically enforced provides that specific performance of a contract cannot be enforced in favour of a person who has become incapable of performing or violates, any essential term of the contract that on his part remains to be performed. **Therefore, the vendee while seeking specific performance/enforcement of a condition to be performed by the vendor must state that either he has performed all the conditions which under the contract he was bound to perform and/or that at all times right from the date of the agreement down to the date of filing the suit he has been ready and willing to perform/fulfill his part of the deal. He is not only supposed to narrate in the plaint his readiness and willingness at all material time to fulfill his part of the agreement but also is bound to demonstrate through supporting evidence such as pay orders, Bank statement or other material, his ability to fulfill his part of the deal leaving no doubt in the mind of the Court that the proceedings seeking specific performances have been initiated to cover up his default or to gain time to generate resources or create ability to fulfill his part of the deal.** It is in that pursuit that the Court to weigh his capacity to perform and 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 obligation also prima facie demonstrates that the non-completion of the contract was not the fault of the vendee and the contract would have been completed, if it has not been renounced by the vendor. Reference can be made to the case of *Abdul Hamid v. Abbas Bhai Abdul Hussain (PLD 1959 (W.F.) Karachi 629).*” [Emphasis added].

The said case makes it abundantly clear that the vendee is required to not only narrate in the plaint his readiness and willingness but is also required to establish it through evidence for purposes of section 24(b) of the Specific Relief Act, 1877.

26. In the case of *Mst. Noor Jehan versus Saleem Shahadat, 2022 SCMR 918* the defendants/appellants denied the very existence of a sale agreement with the plaintiff. However, the Honorable Supreme Court concluded that the “token receipt” which was admittedly executed between the parties constituted a complete and lawfully enforceable agreement to sell. Out of the total sale consideration a certain amount was paid as earnest money. According to the token receipt balance sale consideration was to be paid in three installments. Notwithstanding the aforesaid conclusion that execution of enforceable agreement to sell stood established, the apex Court held the plaintiff/respondent not entitled to the discretionary relief of specific performance as he failed to deposit the sale consideration amount in Court. The Honorable Supreme Court discussed the matter as follows:

“13. However the respondent has not been able to prove that he tendered to the appellants the payment due, as in the first place neither has he been able to prove that he in fact obtained the pay order, or that he offered the same to the appellants. Neither has the respondent produced the original pay order in his evidence as required in terms of Article 75 of Qanun-e-Shahadat Order, nor has he laid before the Court any other evidence, or material that he in fact obtained the pay order from the bank as claimed, and/or that the same was lost or destroyed, though it was imperative for the respondent to have proved the loss of the original, as an essential prerequisite for seeking to produce a photocopy of the pay order. The respondent also did not even move an application for permission to produce and exhibit a photostat copy of the pay order before the Court. He also did not bother to explain, as to when, how and under what circumstances the pay order was lost, destroyed or misplaced. The respondent could have summoned the relevant record and the concerned officer from the payer bank which he choose not to. He has also not even claimed having lodged any complaint or FIR regarding the loss or theft of the pay order. The document was thus rightly not exhibited. The following judgments may be referred to in this regard, State Life Insurance Corporation of Pakistan and another v. Javaid Iqbal (2011 SCMR 1013) and Imam Din and 4 others v. Bashir Ahmed and 10 others (PLD 2005 Supreme Court 418).

...

15. In the circumstances discussed above, we are of the firm view that the respondent has failed to prove that he honoured his commitment and fulfilled his obligation under the "token receipt", and has, in fact, failed to tender the payment of the very first instalment that he was required to in terms of the "token receipt". Even otherwise, it is now well settled that where the vendor refuses to accept the sale consideration amount, the vendee seeking specific performance of the agreement to sell is essentially required to deposit the amount in the Court. The vendee has to demonstrate that he is and has at all relevant times been ready and willing to pay the amount, and to show the availability of the amount with him. **A vendee cannot seek enforcement of reciprocal obligations of the vendor, unless he is able to demonstrate, not only his willingness, but also his capability to fulfil his obligation under the contract.** Reliance may well be placed on the following judgments in this regard; Muhammad Jamil and others v. Muhammad Arif (2021 SCMR 1108), Muhammad Yousaf v. Allah Ditto (2021 SCMR 1241), Muhammad Yaqub v. Muhammad Nasrullah Khan and others (PLD 1986 SC 497), Hamood Mehmood v. Mst. Shabana Ishaque and others (2017 SCMR 2022), Inayatullah Khan and others v. Shabir Ahmad Khan (2021 SCMR 686), Messrs Kuwait National Real Estate Company (Pvt.) Ltd. and others v. Messrs Educational Excellence Ltd., and another (2020 SCMR 171) and Muhammad Shafiq Ullah and others v. Allah Bakhsh (decd.) through LRs and others (2021 SCMR 763).” [Emphasis added].

27. In the instant case too, the Appellant did not establish his readiness and willingness to perform his end of the bargain which was two-fold: (a) payment of balance amount, and (b) transfer of the Barter Plot. The Appellant failed to mention in the plaint that he had the balance amount available with him at the time agreed upon in the Agreement for closing of the transaction. No pay order was prepared by the Appellant nor any bank statement attached with the plaint to show that he was in possession of

sufficient funds at the relevant time. The Appellant subsequently filed an application on 02.07.2016 seeking permission to produce his bank statement. However, such application was dismissed vide the Order dated 16.09.2016 on the ground that the bank statement was neither mentioned in the list of documents relied upon along with the plaint nor in the list of documents submitted pursuant to Order XIII, Rule 1, C.P.C. It has been further noted in the said order that Order XIII, Rule 2, C.P.C., allows production of documents not produced in accordance with the requirements of Order XIII, Rule 1, C.P.C., provided good cause is shown to the satisfaction of court for non-production thereof. The learned Trial Court observed that bank statements can be obtained at any time and as such held that no good cause for non-production was shown by the Appellant. The said order is within the four corners of the law and no legal infirmity has been shown therein.

28. In so far as transfer of the Barter Plot is concerned, the Appellant did not even disclose in the plaint that the Barter Plot does not belong to him let alone state that the owner of such plot is ready and willing to transfer the same in the name of the Respondent No. 1 in satisfaction of the Appellant's obligation under the Agreement. As such, the father's statement as PW-3 in evidence that he is and was ready to transfer the Barter Plot in the name of the Respondent No. 1 is beyond the pleadings and as such inadmissible evidence. In the absence of any evidence, whatsoever, regarding his capability to perform his end of the bargain, I do not find the Appellant/Plaintiff entitled to the discretionary relief of specific performance in light of the Supreme Court judgments.

29. In view of the above discussion, the instant appeal is **dismissed**.

**(SAMAN RAFAT IMTIAZ)
JUDGE**

Announced in the open Court on this 13th day of November, 2023.

JUDGE