

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Second Appeal No.246 of 2024
(Zeeshan Aziz Vs. Malik Tauseef Ahsan)

Date	Order with Signature of Judge
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Priority

1. For order on office objection.
2. For hearing of CMA No.7329/2024.
3. For hearing of main case.

23.01.2026

Mr. Ashfaque Rafiq Janjua, Advocate for the appellant.
Respondent Malik Tauseef Ahsan present in person.

Jawad Akbar Sarwana, J. Appellant/defendant No.1-Zeeshan Aziz is aggrieved by the judgment dated 25.03.2024 wherein respondent/plaintiff's suit for specific performance was dismissed by the Xth Senior Civil Judge, Karachi, South, ("the trial Court") with an award of refund awarded to the respondent/plaintiff in the sum of Rupees twenty lacs (Rs.20,00,000/-) = Rupees two million (Rs.2,000,000/-) constituting the partial sale consideration paid by the plaintiff/respondent to the appellant/defendant No.1 with 15% markup per annum from the date of filing of the suit (November, 2018) till its realization. The appellant/defendant No.1, aggrieved by the trial Court's said judgment, preferred an appeal before the XIIth Additional District Judge, Karachi, South, on the limited ground that as no specific prayer was made by the respondent/plaintiff in Suit No.1361 of 2018 claiming such refund of the partial sale consideration and also markup thereon. He argued that the trial Court, while dismissing the suit for specific performance, could not have awarded the respondent/plaintiff 15% per annum markup on the amount which was lying with the appellant/defendant No.1. He relied on the contents of the written statement and again in the memo of appeal, wherein the appellant/defendant No.1 had offered to return the partial sale consideration of Rupees twenty lacs (Rs.20,00,000/-) = Rupees two million (Rs.2,000,000/-). Therefore, he contested that the appellant/defendant No.1 should not be penalised for the respondent/plaintiff's inaction, and no circumstances to award the refund to the respondent/plaintiff were made out.

After hearing the parties in appeal, the XIIth Additional District Judge, Karachi, South, vide judgment dated 15.07.2024, dismissed the 1st appeal; hence this IInd Appeal.

2. Counsel for the appellant/defendant No.1 reiterated the contentions raised before the appellate forum and expressed willingness to refund the amount and opposed the imposition of 15% markup per annum awarded to the respondent/plaintiff.

3. Respondent/plaintiff, Malik Tauseef Ahsan, present in person, submits that the judgments of the trial Court and the appellate forum are in accordance with law and do not require any interference.

4. Heard the counsel for the appellant/defendant No.1 and the respondent/plaintiff present in person. It is a trite proposition that the grant of specific performance is a discretionary relief, and it is also an admitted position that the partial sale consideration of Rupees twenty lacs (Rs.20,00,000/-) = Rupees two million (Rs.2,000,000/-) remained with the appellant/defendant No.1 since the date of execution of the agreement till the present. During such period, it is apparent from the record that the appellant/defendant No. 1, although he denied the existence of an agreement for specific performance with the respondent/plaintiff, did not refund the partial sale consideration amount admittedly paid to him by the respondent/plaintiff. While the appellant/defendant No.1 does offer to return the partial sale consideration to the respondent/plaintiff in the written statement, a perusal of paragraph-6 of the written statement reveals that this was merely an articulation of an offer to refund the partial sale consideration after the agreement was executed, and before the appellant/defendant No.1 filed the written statement. There is neither any statement nor application filed on his behalf (appellant/defendant No.1) in the trial proceedings, nor any offer made by him during evidence demonstrating that he was ready and willing to return the partial sale consideration. Indeed, the appellant/defendant No.1 deposed in his evidence that he did not return the partial sale consideration, as, according to him, there was a dispute as to the quantum of the refund. According to him, the

amount of the refund was Rupees nineteen million, whereas the respondent/plaintiff allegedly claimed a refund of Rupees fifty million. Nothing available on record suggests that the appellant/defendant No.1 was positively willing to either refund/return the Rupees twenty lacs (Rs.20,00,000/-) = Rupees two million (Rs.2,000,000/-) to the respondent/plaintiff or to deposit the same with the Nazir on a without prejudice basis or otherwise until the disposal of the suit. Simply alluding to a past offer made prior to the institution of the suit, in the written statement, did not mitigate the risk for the appellant/defendant No.1 ending up with a final order potentially made against him (the appellant/defendant No.1), while contending there was no agreement between the parties, for delaying the refund of the partial sale consideration alongwith markup. The appellant/defendant No. 1 could not, on the one hand, deny the contract and, on the other hand, withhold the partial sale consideration admittedly paid to him by the respondent/plaintiff under the very same agreement he denied. The applicant/defendant No.1 continued to retain the partial sale consideration amount at his own risk as to costs and consequences. In the circumstances, he took a chance. He wanted to have the cake and eat it too. If the partial sale consideration had been positively deposited with the trial Court on a without prejudice basis, the action would not have prejudiced his defence. The amount would have been placed in some profit-earning scheme, and the appellant/defendant No.1 would not have had to face the present predicament. Additionally, apart from the latter, he could have deposed, as part of his evidence, that he was willing to return the partial sale consideration and had made an unconditional offer to the respondent/plaintiff to accept it. Perhaps, in such circumstance the appellant/defendant No.1's plea could have been considered sympathetically. However, this never happened. In the instant case, the partial sale consideration funds remained in the pocket of the appellant/defendant No.1 from 28.08.2017 till the present. In the meantime, interest rates set by the State Bank of Pakistan increased during this period and averaged approximately 15% over the last eight (08) years. The respondent/plaintiff has remained out of pocket of the partial sale consideration

amount during this time. When the trial Court dismissed the respondent/defendant No.1's suit for specific performance, he would have lost both the suit property and the partial sale consideration that he paid to the appellant/defendant No.1. In the circumstances, the trial Court ordered refund of the partial sale consideration that the respondent/plaintiff had paid to the appellant/defendant No.1. Such directions/orders in the impugned judgment are neither harsh nor arbitrary. The trial Court rightfully ordered a refund of the partial sale consideration alongwith awarding the markup of 15% per annum awarded to the respondent/plaintiff on the partial sale consideration withheld by the appellant/defendant No.1. The same is reasonable, justified and within the discretionary powers available to the trial Court in the facts and circumstances of the case. I do not find any defect in the reasoning of the two forums below. There is no illegality in the impugned judgment.

5. Given the above, this Second Appeal is hereby dismissed along with the listed application.

JUDGE

Asif