

HIGH COURT OF SINDH AT KARACHI

Present: Mr. Justice Muhammad Faisal Kamal Alam
Mr. Justice Jawad Akbar Sarwana.

High Court Appeal No.97 of 2002

Appellant: Abdul Qayyum Soomro, through
Mr. Haq Nawaz Talpur, Advocate a/w
M/s. Uzair Rasool and Wasim Jokhio
Advocates

v.

Respondent No.1: Mst. Gul Shahnaz, through
Mr. Iftikhar Javed Qazi Advocate

Respondent No.2: The Administrator, Pakistan Defence
Officers Housing Authority, Nemo

Dates of hearing: 22.04.2025, 12.05.2025 &
29.05.2025

Date of Decision: 15.04.2026

J U D G M E N T

JAWAD AKBAR SARWANA, J.: The appellant-Abdul Qayyum Siddiqui (“appellant-AQS”), the defendant no.1 in High Court Suit No.670/1998, is aggrieved by the favourable judgment and decree dated 04.02.2022 and 14.02.2002, respectively,¹ passed in the aforementioned suit for specific performance of contract and permanent injunction filed by the plaintiff/respondent no.1-Gul Shahnaz wife of Muhammad Afzal Chohan (“respondent no.1-Gul Shahnaz) against the appellant-AQS in the High Court, decreeing the suit with costs and for specific performance and injunction with directions to the appellant-AQS to execute the Conveyance Deed in terms of Sale Agreement in favor of the Plaintiff within two months from 04.02.2022, failing which the amount of Rs.400,000 may be deposited with the Nazir of the High Court who may get the formalities completed and execute Conveyance Deed in favor of the respondent no.1-Gul Shahnaz.

¹ Available on pages 199 to 239 of the paperbook. Impugned Judgment is also reported in PLD 2002 Karachi 333.

2. It is common ground between the parties that the Suit Property, namely, plot no.35-C, 24th “B” (Tauheed) Commercial Street, DHA Phase V, Karachi (ad-measuring 200 sq.yds.)(herein after referred to as “**the Suit Property**”) was allotted in favour of Muhammad Afzal Chohan (the husband of respondent no.1-Gul Shahnaz) and Naushad Ali son of Najamul Hussain.² Thereafter, the attorney of Naushad Ali, one Muhammad Arif Siddiqui, withdrew from co-ownership of the Suit Property and gifted fifty percent [half of the share] of the Suit Property to the appellant-AQS. The alleged gift was dated 03.05.1993,³ and the Military Estate Office mutated the Suit Property vide Order dated 07.07.1993, except that when the appellant-AQS submitted the mutation documents on 26.01.1994, it came to light that the total area of the Suit Property in the gift deed was shown as 100 sq.yds. instead of 200 sq.yds. The Pakistan Defence Officers Housing Authority (“PDOHA”) advised the appellant-Abdul Qayyum Siddiqui, to submit a rectification deed, but he took no further action. Thus, as per the record, fifty percent [50%]of the Suit Property has not been so far mutated in the name of the appellant-AQS.

3. In the meantime, the respondent no.1-Gul Shahnaz entered into an agreement to sell dated 11.07.1995, with the appellant-AQS for fifty percent 50% of the Suit Property, i.e. 100 sq. yds.⁴ As respondent no.1-Gul Shahnaz’s husband, Muhammad Afzal Chohan, owned fifty percent [50%] of the Suit Property, the intention appears to be that the Chohans (respondent no.1-wife and husband) intended to acquire full [100%] ownership in the Suit Property. To this end, out of the total sale price of Rs.900,000, it is an admitted position that respondent no.1-AQS paid the appellant-AQS a sum of Rs.500,000 in two instalments of Rs.300,000 and Rs.200,000, leaving a balance payable of Rs.400,000.⁵ As per the

² Paragraph 1 of the Plaint available on page 1 of the paper book paragraph 2 of the Affidavit in Evidence of Mohammad Afzal Choha, available on page 83 of the paper book and paragraph 1 of the Written Statement of appellant-AQS available on page 21 of the paper book, and paragraph 1 of the Written Statement of PDOHA available on page 11 of the paper book.

³ Declaration of Oral Gift Deed dated 03.05.1993 available on pages 97 to 113 of the paper book.

⁴ Agreement to Sell dated 11.07.1995 available on pages 113 to 119 of the paper book.

⁵ Receipts duly admitted by the parties during evidence available on pages 121 and 123 of the paper book.

agreement to sell, this full and final balance sale consideration amount of Rs.400,000, was to be paid to respondent no.1-AQS on the day of execution of the Conveyance Deed in favor of the respondent no.1-Gul Shahnaz.⁶ The agreement to sell further provided that the Conveyance Deed shall be executed by the appellant-AQS upto one (1) month, i.e. 10.08.1995,⁷ and, if the respondent no.1-Gul Shahnaz failed to pay the balance amount, then she would be liable to pay Rs.10,000 per month to the appellant-AQS and such condition would remain valid only for two months. Additionally, two months after the date of execution of the sale agreement, i.e., 11.07.1995, the agreement would automatically stand cancelled by both parties, and the earnest money of Rs.300,000 would be forfeited.⁸

4. According to evidence brought on record, the appellant-AQS did not execute the Conveyance Deed, and respondent no.1-Gul Shahnaz filed Suit No.1332/1995 for declaration of title and prayer for consequential relief in terms of a permanent injunction in respect of the Suit Property. The trial Court rejected the plaint filed in Suit No.1332/1995 vide Order dated 10.07.1997, on two grounds, namely, that the respondent no.1-Gul Shahnaz (i) ought to have filed a suit for specific performance, and (ii) the value of the property as per the plaint was Rs.900,000 which was beyond the pecuniary jurisdiction of the civil Court, hence the trial court did not have pecuniary jurisdiction to entertain the suit.⁹ Aggrieved by the order of the trial Court, respondent no.1-Gul Shahnaz preferred Civil Appeal No.44/1997 before the VIIth Addl. District Judge Karachi (South), however, the same was dismissed vide Order dated 20.02.1998.¹⁰ Respondent no.1-Gul Shahnaz did not raise any further challenge to this appellate order, which attained finality.

⁶ Clause 1 of the agreement to sell available on page 115 of the paper book.

⁷ Clause 8 of the agreement to sell available on page 117 of the paper book.

⁸ Clause 2 of the agreement to sell available on page 115 of the paper book.

⁹ Order dated 10.07.1997 passed by the IInd Senior Civil Judge Karachi South in Suit No.1332/1995 available on pages 131 to 135 of the paper book.

¹⁰ Order dated 20.02.1998 passed by the VIIth Addl. District Judge Karachi South in appeal no.44.1997 available on pages 137 to 149.

5. After dismissal of the appeal, respondent no.1-Gul Shahnaz Counsel sent a Legal Notice dated 24.10.1995 addressed to the appellant-AQS, claiming that the latter had still not executed the Conveyance Deed in favor of respondent no.1-Gul Shahnaz and that the agreed period for performance had expired. Counsel did not express either ability, readiness, or willingness on the part of the respondent, no.1-Gul Shahnaz, to pay the balance sale consideration of Rs. 400,000 to the appellant-AQS.

6. Thereafter, on 25.05.1998, respondent no.1-Gul Shahnaz filed suit no.670/1998 in the High Court of Sindh at Karachi, this time seeking specific performance of the agreement to sell and a permanent injunction. The suit culminated in the impugned judgment and decree dated 04.02.2002 and 14.02.2002, respectively, wherein, inter alia, the Single Bench of this Court decreed that:

“the Defendant No.1 [“appellant-AQS”] do specifically perform the contract executing conveyance deed in terms of Sale Agreement in favor of plaintiff [“respondent no.1-Gul Shahnaz”] and receive the balance sale consideration of Rs.400,000 in respect of [the Suit Property] within two months hereof, i.e. 04.02.2002, failing which the amount of Rs.400,000/- ma be deposited with Nazir of this Court who may get the formalities completed and execute conveyance deed in favor of plaintiff.”

7. The record available indicates, and Counsel for the parties concede that the respondent no.1-Gul Shahnaz has yet to deposit the balance sale consideration of Rs.400,000 so far. Further, no execution proceedings have been initiated either. Additionally, on 22.03.2016, the respondent no.1-Gul Shahnaz filed an application under Section 151 CPC (CMA No.4871/2016) in Suit No.670/1998

seeking to deposit the balance sale consideration,¹¹ but never did,, and, instead, got the said CMA withdrawn vide Order dated 17.11.2016.¹²

8. Learned Counsel for the appellant submitted that the respondent no.1-Gul Shahnaz, continuing failure to fulfill its part of the bargain, i.e. (i) not depositing in Court the balance sale consideration during the trial proceedings, and thereafter, (ii) once the judgment and decree were passed, not to deposit the decretal balance amount with the Nazir, once again, demonstrates mala fide of respondent no.1-Gul Shahnaz. Thus, the impugned Judgment ought not have granted the discretionary relief of specific performance to the respondent no.1-Gul Shahnaz. He argued that the agreement to sell stood cancelled. Furthermore, as the respondent no.1-Gul Shahnaz, had yet to deposit the decretal amount payable of Rs.400,000 with the Nazir, the appeal should be allowed on this score too, and the judgment and decree be set aside. Additionally, Counsel contended that once the respondent no.1-Gul Shahnaz plaint filed in suit no.1332/1995 was dismissed, the subsequent suit no.670/1998 was barred under Order 2 Rule 2 and 3 CPC. Therefore, in the facts and circumstances of the case, the impugned Judgment could not have granted the discretionary relief of specific performance. Appellant Counsel relied on the following case law:

1. 2021 SCMR 1241
2. PLD 2014 SC 506
3. 2007 SCMR 1464
4. PLD 1948 PC 131
5. PLD 2018 SC 828
6. 2021 PTD 835

9. Learned Counsel for the respondent, no.1-Gul Shahnaz, vehemently opposed the grounds of appeal. He contended that the two suits, namely, suit no.1332/1995 and 670/1998, were based on

¹¹ Application under Section 151 CPC (CMA No.4871/2016) available on page 137 of the Statement dated 21.03.2023 filed by the appellant in the appeal file.

¹² Certified copy of the Order dated 07.11.2016 passed in Suit No.670/1998 available on page 145 of the Statement dated 21.03.2023 filed by the appellant in the appeal file.

separate causes of action; and the subsequent suit was maintainable against the same defendant/appellant-AQS. Counsel argued that the appeal was a continuation of the trial proceedings, hence the respondent, no.1-Gul Shahnaz, was at liberty to initiate execution proceedings and/or decide the timing of the deposit of the decretal amount. He further contended that the impugned judgment and decree were well-reasoned and based on a proper appreciation of the law. Thus, the appeal was liable to be dismissed. Respondent Counsel relied on the following case law:

1. 2007 SCMR 1464
2. PLD 2004 790
3. 2016 SCMR 179
4. PLD 1983 SC 344
5. 1991 CLC 1305

10. Heard Counsel, perused the documents available in the appeal file and paper book. The points for determination and our findings on these points with reasons are set out as herein below.

Point No.1. Whether the learned Single Bench has not properly appreciated pleadings, oral as well as documentary evidence on record and the impugned judgment and decree requires the interference of this Court?

Point No.2. What should the judgment be?

FINDINGS

Point No.1. Negative.

Point No.2. Appeal is allowed as below.

Point No.1.

11. At the outset, it is a trite principle of law that the relief of specific performance is a discretionary relief. Therefore, whether a

case is made out for such relief depends on the facts and circumstances peculiar to each case as brought on record by way of evidence. To this end, it is common ground between the parties, including the PDOHA, since the commencement of the dispute in the 1990s, that 50% of the Suit Property was/is not in the name of the appellant-AQS. First, there is no denial either by the plaintiff-respondent no.1 or the defendant-appellant-AQS, that the declaration of gift is not duly registered with the Military Estate. None has denied that the declaration of gift is currently lying under objections. The appellant-AQS admitted in his cross-examination that:

“It is correct that the mutation [of the Suit Property] has not been completed in my favour on the Defence Housing Authority as yet. It is correct that I cannot effect transfer in favor of Shahnaz till mutation is effected. . . .”

Thus, the learned Single Bench of this Court observed in paragraph 8 of the impugned judgment that the appellant-AQS,

“. . .also admitted that mutation has not been made in his favour in the Defense Housing Authority as yet and that he cannot effect transfer in favour of plaintiff in absence of mutation.”

As such, when the Single Bench allowed the respondent no.1-Gul Shahnaz her prayer for specific relief, the Judgment and Decree created an entirely new situation alien to the suit. The decree passed by the learned Single Bench, in effect, deemed without any evidence recorded in support thereof that the appellant-AQS, who never had ownership of the Suit Property, and the declaration of gift was yet to be completed, was assumed in the impugned judgment to be the true and lawful owner of the Suit Property. Indeed, all parties agreed that the Suit Property had and has not, so far, been mutated in the records of the Land Registry to appear in the name of the appellant-AQS. The evidence brought on record demonstrates that the Suit Property stood jointly in the name of Muhammad Afzal Chohan and Naushad Ali. As per evidence, the appellant-AQS was

like a stranger in the Suit Property. Indeed, if the seller, appellant-AQS, never had ownership of the Suit Property, he could not transfer something he never had title to the buyer, respondent no.1-Gul Shahnaz. Further, the appellant-AQS has still not made any effort to acquire the Suit Property by completing the mutation in his name, as advised by the Land Registry, which has advised him to file a rectification application, which he did, but did not subsequently follow up on the matter. Thus, the objections raised by the Land Registry continue to hang over the Suit Property and remain hanging even today. In the circumstances, the respondent no.1-Gul Shahnaz cannot use her suit for specific performance to bridge the lacuna concerning the ownership of the Suit Property viz. the appellant-AQS, which lacuna or gap continues to remain in place. No case for a decree of specific performance of a contract can be made out to award title to a plaintiff-buyer from the sale of a property in which the defendant-seller does not have a proper title. It would be contrary to law, tantamount to side-stepping procedure, as well as contrary to public policy to do so. If the suit as decreed now is allowed by this appellate bench, it would give an unfair advantage to the respondent no.1-Gul Shahnaz, who would achieve the objective of obtaining title in the Suit Property from what effectively would have been a seller who was/is presently not its true and lawful owner, at least until the rectification application is approved by PDOHA and the Suit Property is properly mutated in the name of the appellant-AQS pursuant to the declaration of gift by Naushad for the entire fifty percent of the Suit Property, that is/was the subject matter of the plaintiff-respondent no.1 suit for specific performance whereas the alleged declaration of gift is described in the declaration of gift as 100 square yards and the schedule of property describes the declaration of oral gift deed limited to 50% of 100 sq. yards . Till then the respondent no.1-Gul Shahnaz is not entitled and eligible to get such Suit Property indirectly (through a decree of specific performance) which she cannot do directly. Finally, a suit for specific performance of an agreement to sell cannot be sustained when, at the time of institution of the suit, the seller is not the legal

owner of the Suit Property. No purpose will be served now, at this stage, too, to entertain a decree for specific performance and keep it hanging, contingent on the happening of a future event, i.e. as and when the appellant-AQS, finally gets the Suit Property mutated in his name. Indeed, the mutation in question requires legal sanctity, and the suit for specific performance filed by the purchaser-plaintiff, as it is/was framed, is framed to resolve matters concerning the defendant-seller's title in the Suit Property. The appellant-AQS is required to prove his title/ownership in the Suit Property, which the record and evidence presently reflect is held jointly by Muhammad Afzal Chohan and Nausheed Ali and not the appellant-AQS.

12. There is also another aspect of the matter, which is now well-established by the Supreme Court, that a buyer's primary obligation in a contract of sale is to make payment of the balance sale consideration as stipulated in the contract. In the instant case, the appellant-seller has not refused to accept payment from the respondent no.1-buyer. Further, the respondent no.1-buyer did not deposit the balance of the sale consideration during the trial proceedings. Furthermore, she did not do so during the appellate stage when the decree specifically directed her to do so. Instead, the respondent no. 1-buyer did not fulfil her obligation to secure/tender the sale consideration during the pendency of the suit, nor did she comply with this Court's direction to deposit the sale consideration in Court with the Nazir. The respondent no.1-buyer has delayed and continues to delay and dilly-dally the deposit of the decretal amount, too, now well beyond six years from the date of the impugned decree. Thus the respondent no.1-Gul Shahnaz has not been able to convincingly demonstrate that after the impugned judgment and decree, pursuant to even the directions of such judgment and decree, that she was and still is willing to accept the performance of the decree within the time so fixed or even beyond such time (otherwise) or that circumstances are such that the respondent no.1-Gul Shahnaz is willing to deposit such payment today except for one reason why she may not have deposited the

balance sale consideration. This may be that the respondent no.1-Gul Shahnaz, although she did not prefer an appeal to the impugned judgment and decree, has come to realise that, in the facts and circumstances of the case, the appellant-AQS did not and still does not have title in the Suit Property. Therefore, perhaps, she has decided not to part with her money and as a prudent buyer, refrained from depositing the balance sale consideration (read: any further funds) with the Nazir as per the decree. Indeed, the decree itself requires her to take such action (deposit of the balance of the sale consideration) for the Nazir to trigger the transfer of the Suit Property. However, the respondent no.1-Gul Shahnaz, as observed by us hereinabove, recognises the futility of such a deposit with the Nazir, given that the Suit Property is not currently mutated in the name of the appellant-AQS. Hence, she has not deposited the balance sale consideration as per the impugned judgment and decree passed by the Single Bench of this Court, and awaits the outcome of the appeal.

13. Under the facts and circumstances of the case, we are of the considered view that the learned Single Bench of this Court has not appraised the evidence correctly nor appreciated the law on the subject property and arrived at the wrong conclusion by passing a decree of specific performance of contract concerning the Suit Property, which was not in the ownership of the defendant/appellant-AQS. In a suit for specific performance, it is always a paramount consideration that the plaintiff, seeking an equitable remedy of specific performance, must be legally entitled to performance of the contract. Since, all parties are at idem that the Suit Property is yet to be mutated in the name of appellant-AQS, no specific performance can be granted when the Suit Property is not in his name, as yet. This also explains why respondent no.1-Gul Shahnaz appears to be rather unwilling to perform her part of the contract and/or decree in her favour. Given the above reasons, in our view, is sufficient to disentitle the respondent no.1-Gul Shahnaz, to a decree for specific performance.

14. Before parting with this lis, there is another matter which we need to address, and that is, if the contract between the parties was not capable of performance as discussed above, then the appellant-AQS cannot be allowed to be unjustly enriched by continuing to hold on to the funds of the sale price of Rs.500,000 paid by the respondent no.1-Gul Shahnaz to the appellant-AQS. Indeed, this amount needs to be refunded to the respondent no.1-Gul Shahnaz. To this end, the respondent no.1-Gul Shahnaz is entitled to restitution/refund in the sum of Rs.500,000 along with simple interest/mark-up at the rate of 10% per annum from the date of this appellate judgment till the date of payment. After deliberation, we decided not to impose any interest on the delay of refund of Rs.500,000 for the reason that the Single Bench [of this Court] too, in 2002, when it directed the respondent no.1-Gul Shahnaz to deposit the balance sale consideration with the Nazir, also did not take into consideration that the value of the Suit Property had considerably appreciated from 1995 to 2002. Yet neither party pleaded this aspect at trial or on appeal. Therefore, to keep matters simple, we have avoided discussion of interest/mark-up having accrued concerning either the balance sale consideration of Rs.400,000, which was payable by the respondent no.1-Gul Shahnaz as per the impugned judgment and decree, or the restitution/refund of Rs.500,000 to be refunded by the appellant-AQS to respondent no.1-Gul Shahnaz as per this appellate judgment.

Point No.2.

15. Given the above, this appeal is allowed; the impugned judgment and decree are set aside, and consequently the suit for specific performance of contract filed by respondent no.1-Gul Shahnaz is dismissed with no order as to costs but the restitution/refund of Rs.500,000 paid by the respondent no.1-Gul Shahnaz to the appellant-AQS is to be refunded by the appellant-AQS to the respondent no.1-Gul Shahnaz, in the above terms.

16. The office is directed to prepare an appellate decree in the above terms.

JUDGE

JUDGE