

IN THE HIGH COURT OF SINDH AT KARACHI

IIInd Appeal No. 06 of 2022

[Saqib Aliv..... Muhammad Tehseen Jawed & others]

Date of Hearing : 16.01.2023
Appellant through : Mr. Liaquat Ali, Advocate.
Respondents through : M/s. Syed Qamar Abbas Zaidi, Haseena Tabassum Shaikh, Javed Siddiqui and Nasir Rizwan Khan, Advocates

J U D G M E N T

Zulfiqar Ahmad Khan, J:- This Second Appeal moved under Section 100 of the Code of Civil Procedure, 1908 is directed against the Judgment & Decree dated 03.11.2021 (“Impugned Judgment & Decree”) passed by the learned IIIrd Additional District Judge South, Karachi in Civil Appeal No.244 of 2018 (“Civil Appeal”), whereby, the appeal filed by the respondents was allowed.

2. Precise facts of the case are that one Muhammad Buland Iqbal Khan was owner of Flat No. 1 & 2, Plot No.C-3-C, Khayaban-e-Sehar (Commercial) Phase-VII, Karachi (“subject flats”) who mortgaged the subject flats with Standard Chartered Bank and owing to default in payment of principal loan amount, the Bank initiated recovery proceedings against the said Muhammad Buland Iqbal Khan (“previous owner”) which was allowed by the learned banking Court and the said flats were put to auction by the Court. It is alleged by the appellant that he met with the previous owner and entered into an agreement to sell on 03.07.2012 and paid an advance amount of Rs. 10,00,000/- to the previous owners and as the time went by the appellant failed to pay remaining amount to the previous owner as well as to the bank and that the learned Banking Court allowed thrice to appellant to pay

the remaining amount of Rs.30,00,000/- but he failed to do so and resultantly the previous owner of the subject flats issued a cancellation notice of sale agreement to the appellant and entered into a fresh sale agreement with respondents who paid the entire sale consideration of the subject flats to the bank including previous owner thenceforth the learned banking Court returned the original title documents to the attorney of the previous owner who executed the same in the name of respondents. The respondents filed a suit No.1188/2014 which was dismissed vide Judgment dated 25.09.2018. The respondent impugned the Judgment & Decree of the learned trial Court by filing Civil Appeal No.244/2018 and that the learned First Appellate Court having observed pros and cons reversed the findings of the learned trial Court through impugned Judgment & Decree, hence the appellant before this Court under the provision of Section 100 CPC being second appeal.

3. Mr. Liaquat Ali, Advocate set forth the stance of the appellant stating that appellant is bona fide purchaser of the subject flats and paid partial payment which fact was admitted by the respondents and during subsistence of one sale agreement, the previous owner could not enter into a second sale agreement with the respondents. He further submitted that the appellant is in possession of the subject flats having vested rights in his favour. He further argued that the learned trial Court rightly dismissed the suit filed by the respondents, which Judgment & Decree ought to be sustained.

4. In opposition to the above submissions, learned counsel for the respondents argued that appellant failed to deposit the remaining sale consideration of the subject flats and never showed his readiness

to purchase the subject flats nor deposited the remaining amount, on account of which the previous owner issued a cancellation notice to the appellant. He further contended that the learned Banking Court also provided several opportunities to the appellant to deposit the remaining sale consideration but he deliberately failed and these aspects were examined in the impugned Judgment & Decree which is in accordance with law and the learned First Appellate Court passed the impugned Judgment & Decree with correct appreciation of law as well as evidence which judgment does not require any interference of this Court.

5. I have heard the respective learned counsel and have also considered the record to which my surveillance was solicited. It is considered pertinent to initiate this deliberation by referring to the settled law in such regard. To start with, it is common knowledge that right to file Second Appeal provided under section 100 of CPC, which can be set into motion only when the decision is contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law. In the case of **Madan Gopal vs. Maran Bepari (PLD 1969 SC 617)**, the Hon'ble Supreme Court held that if the finding of fact reached by the first Appellate Court is at variance with that of Trial Court, such a finding by the lower Appellate Court will be immune from interference in second appeal only if it is found to be substantiated by evidence on the record and is supported by logical reasoning, duly taking note of the reasons adduced by the first Appellate Court.

7. I have heard the learned counsel for the parties and scanned the available record. The crux of impugned Judgment & Decree is reproduced hereunder:-

“I am of the humble opinion that no doubt respondent No.2 executed agreement of sale in favour of respondent No.1 and also received advance amount from respondent No.1 and delivered possession of the suit property to respondent No.1 but respondent No.1 failed to pay remaining consideration amount as he failed to pay the same in banking Court though banking Court given opportunities to deposit such amount. Therefore, respondent No.2 issued notice to cancellation of agreement to respondent No.1 and enter into subsequent agreement of sale with appellant who deposited the amount in Banking Court through attorney. Banking Court also dismissed application u/o Rule 10 CPC filed by respondent No.1 and handed over original documents of the suit property to attorney of appellant. Lis pendence transaction is not void on the score that it was done during pendency of some lis but the fate thereof would remain suspended till final verdict of that Court which was seized of the matter. In this regard reliance is placed upon PLD 2003 SC 818. In the present case, respondent No.1 failed filed civil Suit No.985/2013 against respondent No.2 which was dismissed vide judgment dated 24.10.2014 passed by the Court of learned IVth Sr. Civil Judge, Karachi South. Respondent No.1 preferred a civil appeal No.208/2014 which was also dismissed vide judgment dated 27.09.2021 passed by the Court of learned VIIIth ADJ Karachi South. Respondent No.1 did not prefer appeal against judgment of first appellate Court, therefore such verdict attained finality.”

8. It is gleaned from appraisal of the foregoing that the appellant was granted several opportunities by the learned Banking Court to perform his part performance however he failed. He neither deposited the remaining sale consideration of the subject flats with the learned Banking Court or Standard Chartered Bank nor with the respondent No.2 who was a previous owner of the subject flats. It further unfurls from appraisal of the foregoing that the respondent

No.2/previous owner of the subject flats also issued a cancellation notice to the appellant which fact was also discussed by the learned Appellate Court in the impugned Judgment. It is considered expedient to illustrate here that the appellant preferred a Civil Suit 985/2013 for specific performance of an agreement which was dismissed by the learned trial Court vide Judgment and Decree Dated 24.10.2014 an appeal was also preferred by the appellant by filing Civil Appeal No.208/2014 which met the same fate and the conclusion was drawn from those litigation that the appellant never showed his readiness and willingness.

9. It is a well-settled exposition of law that the relief of specific performance of a contract is discretionary, however the said discretion cannot be exercised arbitrarily or unreasonably but can be invoked to promote fairness and equity. The person seeking specific performance has to put on show a firm that he is geared up and fervent to perform his part of the contract, but the other side is circumventing or evading the execution of his obligations arising out of the contract. While deciding the suit for specific performance of a contract, a Court has to consider and come to a decision regarding whether the plaintiff is ready and willing to perform his part of the contract, which is in fact substantiated by the conduct or demeanor of the plaintiff before and after instituting the lawsuit. This equitable remedy rests on the discretion which is obviously exercised according to the well-established standards and philosophy of law and not whimsically or capriciously. The fundamental insightfulness of the Courts in directing the plaintiff in a suit for specific performance to deposit the sale consideration in Court in fact articulates that the

vendee has the capacity to pay the balance sale consideration and is ready and willing to perform his obligations arising from the contract. An incessant readiness and willingness is a condition precedent for claiming relief of specific performance, which in unison also conveys the state of mind of the vendee, his capability to pay, keenness and commitment. The Hon'ble Supreme Court in the case of M/s. D.W. Pakistan Pvt. Ltd. Lahore v. Begum Anisa Fazle Mahmood & others (2023 SCMR 555 rel. para 6) held the similar principle and it is considered pertinent to reproduce the relevant excerpt hereunder:-

It is a well-settled exposition of law that the relief of specific performance of a contract is discretionary, however the said discretion cannot be exercised arbitrarily or unreasonably but can be invoked to promote fairness and equity. The person seeking specific performance has to put on show that he is geared up and fervent to perform his part of the contract, but the other side is circumventing or evading the execution of his obligations arising out of the contract. While deciding the suit for specific performance of a contract, the Court has to consider and come to a decision regarding whether the plaintiff is ready and willing to perform his part of the contract, which is in fact substantiated by dint of the conduct or demeanor of the plaintiff before and after instituting the lawsuit. The equitable remedy rests on the discretion which is obviously exercised according to the well-established standards and philosophy of law and not whimsically or capriciously. The fundamental insightfulness of the Courts in directing the plaintiff in a suit for specific performance to deposit the sale consideration in Court in fact articulates that the vendee has the capacity to pay the sale consideration or balance sale consideration and is ready and willing to perform his obligations arising from the contract. An incessant readiness and willingness is a condition precedent for claiming relief of specific performance, which in unison also conveys the state of mind of the vendee, his capability to pay, keenness and commitment.

10. To me, the findings of the learned First Appellate are based upon the correct appreciation of law as well as on fact. In the case of **Madan Gopal vs. Maran Bepari (PLD 1969 SC 617)**, the Hon'ble Supreme Court held that if the finding of fact reached by the first Appellate Court is at variance with that of Trial Court, such a finding by the lower Appellate Court will be immune from interference in second appeal only if it is found to be substantiated by evidence on the record and is supported by logical reasoning, duly taking note of the reasons adduced by the first Appellate Court which is the case at hand.

11. The instant IInd Appeal was dismissed vide short order dated 16.01.2024 in the following terms:-

“For the reasons to follow, this appeal is dismissed. The respondents’ counsel has stated that he will not press any financial claim as of mesne profit or the rent of the premises that was enjoyed by the appellant. Within two months the appellant will vacate the premises.”

12. Above are the reasons of the above short order.

Karachi
Dated:02.02.2024

JUDGE

Aadil Arab