

**IN THE HIGH COURT OF SINDH AT KARACHI**

Present:

Mr. Justice Muhammad Shafi Siddiqui

Mr. Justice Omar Sial

**High Court Appeal No. 107 of 2019****High Court Appeal No. 108 of 2019****Razia Roshan****..... Appellant**

through Mr. Abdul Qayyum Abbasi, Advocate

vs.

**Farheena Ali & others****..... Respondents**

through Mr. Shoukat Hayat, Advocate

Mr. Sandeep Malani, A.A.G. Sindh for  
respondent No.4

Date of hearing: 27.02.2024

Date of short order: 27.02.2024

Date of reasons: 05.03.2024

**JUDGMENT**

**OMAR SIAL, J:** On the 20th of February 2004, Farheena Alvi agreed to sell her property to Razia Roshan upon the terms and conditions of an agreement to sell, which they executed the same day. The total sale consideration agreed was Rs. 10,000,000. An advance of Rs. 1,000,000 was given to Farheena, while the balance amount was to be paid when the sale deed would be registered. It was disclosed to the buyer that there are tenants in the property, and if Farheena could not vacate them within two months from the date of the agreement, then the “time for payment and execution of Sale Deed can be extended”. On May 12, 2004, the parties mutually extended this period of two months till July 15, 2004. Farheena could not have the tenants vacated, prompting Razia’s counsel to send a legal notice on August 21, 2004, calling upon Farheena to get the property vacated. On October 16, 2004, Farheena’s counsel wrote to Razia,

informing her that one of the two tenants had refused to leave. She offered that Razia take back the Rs. 1,000,000 advance payment or buy the property with the tenant. The offer was declined vide Razia's counsel's letter dated October 20, 2004. In the same letter, the counsel wrote that his client has the balance sale consideration with him and that a sale deed should be executed for the property without the tenant. On October 27, 2004, Farheena's counsel wrote to Razia's counsel, informing him that the agreement to sell stood frustrated and rescinded. Suit No. 1253 of 2004 was filed by Razia, seeking the performance of the agreement to sell, whereas Suit No. 1338 of 2004 was filed by Farheena, seeking cancellation of the agreement. A learned Single Judge of this Court on December 3, 2018, decreed Suit No. 1338 of 2004 and dismissed Suit No. 1235 of 2004. Razia Roshan, unhappy with the dismissal, has preferred this appeal.

2. We have heard the learned counsel for both parties and have perused the record. Their respective arguments are not being reproduced but are reflected in our observations and findings below.

3. Though not explicitly stated, the contract between the parties appears to be a contingent contract. The execution of the Sale Deed would only occur when the tenements were vacated. The agreement to sell was to proceed once the property was rid of the tenants. The contract, however, does not state what will happen if the tenants are not vacated. The only outcome given is that the time for performance will be mutually agreed upon if the tenants do not vacate. As the learned Single Judge points out, section 32 of the Contract Act of 1872 provides that contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has occurred. If the event becomes impossible, such contracts become void. Section 34 provides that if the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies. Section 35 stipulates that contingent contracts to do or not to do anything if a specified uncertain event happens within a

fixed time become void if, at the expiration of the time fixed, such event has not happened or if, before the time fixed, such event becomes impossible.

4. In the current case, two months was the time frame within which Farheena would try to get the tenants vacated. This time frame was mutually extended until October 16, 2004, when Razia was informed that the tenants refused to leave and, therefore, the event upon which the contract was contingent could not happen anymore. In terms of section 35, the contract was frustrated. It is now well established that the remedy of specific performance is discretionary and cannot be claimed as right by any party. Reference may be made to *Mrs Zakia Hussain vs Syed Farooq Hussain* (PLD 2020 SC 401) and *Liaquat Khan vs Falak Sher* (PLD 2014 SC 506). In the current case, the appropriate disclosure was made by Farheena, i.e., there are tenants in the property, and she would try to vacate them before the Sale Deed was executed. Razia was always aware of the situation and wanted vacant possession of the property. The parties envisaged that this task was challenging and, therefore, agreed to an extension in time for the registration of the Sale Deed upon mutual agreement. One of the two tenants was vacated, which signifies the efforts made by Farheena, however, one tenant refused to leave. Following the legal course to vacate them would have been a protracted exercise dependent upon conditions to get it vacated. For this reason, she wrote to Razia, telling her that she had failed to get the tenants out and, therefore, the contract stood frustrated.

5. The agreement to sell was entered into on February 20, 2004, and rescinded on October 27, 2004. Yet, the first time Razia showed that she was willing and able to complete the transaction was on February 21, 2017, thirteen years after the agreement to sell was entered into. An application accompanying a pay order for Rs. 9 million was produced in Court at the time of the final arguments in the Suit. This was an afterthought and Razia's attempt to strengthen the case. Apart from the fact that the agreement became void, it is also true that Razia did not take any meaningful steps in the 13 years that passed to show that she had the ability to pay the balance amount and had made efforts to give the money to Farheena. Razia's

attorney, Roshan Ali, acknowledged at trial that “no such pay order was prepared because we had asked the defendant no. 1 [Farheena] to be ready to transfer the suit property at that time we make payment of balance”. All along, Razia asserted that she wanted the physical vacant possession of the property. This stance changed when her attorney at trial stated, “We had verbally asked the defendant no. 1 to transfer the suit property in our favour along with one tenant.” Like the pay order, this change in stance was also an afterthought and ostensibly made to capitalise on the exponential increase in the price of the property.

6. Learned counsel for the appellant has relied on Muhammad Asia Awan vs Dawood Khan and others (2021 SCMR 1270) to support his case. We find the facts of that case totally different to the present one.

7. Section 64 of the Contract Act, 1872 stipulates that the party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received. In view of this provision Razia is entitled to receive back the Rs. 1 million that she had paid as advance money. This may be returned to her with a mark-up of 5% per annum by Farheena, if not already done.

8. Above are the reasons for dismissing the appeals through our short order dated 27.02.2024.

JUDGE

JUDGE