

129/23

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

Mr. Justice Yahya Afridi  
Mrs. Justice Ayesha A. Malik  
Mr. Justice Syed Hasan Azhar Rizvi

(AFR)-DJ

**Civil Petition No.5632 of 2021**

(Against judgment dated 22.09.2021, passed by the Islamabad High Court,  
Islamabad in Regular First Appeal No.324 of 2020)

***Masood Ahmad Bhatti and another***

...Petitioner(s)

***Versus***

***Khan Badshah and another***

...Respondent(s)

For the Petitioner(s) : Mr. Hassan Raza pasha, ASC  
Syed Rifaqat Hussain Shah, AOR

For the Respondent(s) : N.R.

Date of Hearing : 16.11.2023

**JUDGMENT**

**Syed Hasan Azhar Rizvi, J:-** Through the instant petition filed under Article 185(3) of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioners have assailed the judgment dated 22.09.2021 passed by the Islamabad High Court, Islamabad (**the High Court**) whereby Regular First Appeal No.324 of 2020 filed by them was dismissed.

2. Facts of the case leading to filing of the instant *lis* are that Petitioner No.1 (*Masood Ahmad Bhatti*) being general attorney of Petitioner No.2 (*Najeeb Ahmed Bhatti*) sold out the property known as "Najeeb Plaza" situated at Plot No.2/F-1, measuring 337.5 square yards, Sector 1-9 Markaz, Islamabad comprising of basement, ground floor and first floor (*hereinafter referred to as the plaza*) to Respondent No.1 (*Khan Badshah*) *vide*

agreement to sell dated 26.01.2017 against a total sale consideration of Rs.80,000,000/- (eighty million). Respondent No.1/plaintiff paid Rs.10,000,000/- (ten million) through Pay Order No.05751452 dated 25.01.2017 to Petitioner No.1 addressed to Petitioner No.2, by name, who drawn that from United Bank Limited, Main Markaz, F-8, Islamabad and the remaining sale consideration was agreed to be paid at the time of transfer of the subject plaza to Respondent No.1 on or before 27.04.2017 by Respondent No.2 (CDA). The subject plaza was sold on the basis of "as it is".

Petitioner No.1 served the legal notice dated 13.02.2017 upon all the tenants of the subject plaza for vacation of the shops for which Respondent No.1 managed to get vacated some of the shops, flats and basement by paying advance rent amounting to Rs.425,000/-.

3. As the petitioners failed to obtain the NOC from the CDA for the transfer of the subject plaza in the name of Respondent No.1 by due date i.e. 27.04.2017, therefore, the agreement to sell executed in between the petitioners and Respondent No.1 was extended by another Agreement dated 22.05.2017 entered in between Respondent No.1 and Petitioner No.2 (*the actual owner*), thereby date for finalization of transaction was extended upto 15.06.2017. Respondent No.1 at the time of the extension of the agreement paid further amount of Rs.5,000,000/- (five million) through Pay Order No.2882936 dated 20.06.2017 to Petitioner No.2, who drawn that from Faysal Bank Limited, Islamabad.

4. Respondent No.1 contacted the petitioners to transfer the subject plaza in his name and offered pay order in the name of Petitioner No.2 for the remaining sale consideration. However, the petitioners refused to receive the balance sale consideration and denied the performance of the agreement to sell. Respondent No.1 had arranged the

remaining sale consideration in the shape of pay orders, detail whereof is as under: -

- "1) 10 Million through PO No.05751452, UBL dated 25.01.2017 (Paid)
- 2) 05 Million through PO No.04227383, FBL dated 15.05.2017 (Paid)
- 3) 22.5 Million through PO No.13623073, UBL dated 06.06.2017 (Ready)
- 4) 7.5 Million through PO No.04227423, FBL dated 23.05.2017 (ready)
- 5) 10 Million through PO No.06188048, UBL dated 23.05.2017 (Ready)
- 6) 05 Million through PO No.2838544, MCB dated 23.05.2017 (Ready)
- 7) 05 Million through PO No.03194126, Meezan Bank dated 23.05.2017 (Ready)
- 8) 10 Million through PO No.00000046, Alfalah Bank dated 23.05.2017 (Ready)
- 9) 05 Million through PO No.03194127, Meezan Bank dated 23.05.2017 (Ready)
- 10) 1.2 Million through PO No.2838657, MCB dated 15.06.2017 (Ready)."

5. On failure to comply with the agreements entered in between the parties, Respondent No.1 filed a suit on 20.06.2017 for specific performance of Agreement dated 26.01.2017 and continuation/extended Agreement dated 22.05.2017 along with damages against the petitioners and Respondent No.2 in the Court of Civil Judge 1<sup>st</sup> Class, Islamabad (West). The petitioners and Respondent No.2 were served; they appeared before the trial Court and filed their written statements on 02.11.2017 and 13.10.2018. The trial Court, on divergent pleadings of the respective parties, framed issues on 25.02.2019 so also additional issues on 10.04.2019.

6. After recording of evidence and hearing the learned counsel for the parties, the suit filed by Respondent No.1 was decreed to the extent of specific performance of the Agreement dated 26.01.2017 and

continuation/extended Agreement dated 22.05.2017, while to the extent of damages the same was dismissed by the trial Court *vide* judgment and decree dated 26.10.2020.

7. The petitioners challenged the judgment and decree of the trial Court before the High Court by filing RFA No.324 of 2020, which met the fate of dismissal *vide* impugned judgment dated 22.09.2021 holding that the judgment and decree of the trial Court does not suffer from any error of law or fact.

8. Mr. Hassan Raza Pasha, learned ASC appearing on behalf of the petitioners, has contended that the impugned judgment is fanciful and based on surmises and conjectures; the judgment and decree passed by the trial Court is suffering from irregularity and jurisdictional defect; that the refusal of the petitioners to receive the pay orders from aliens/unknown persons was justifiable to avoid further complexity regarding the source of money in the present scenario and litigation relating to the suit property; that Respondent No.1 had already prayed for issuance of decree and damages in the shape of rate of KIBOR per month as an alternate relief, however, the same was not considered by the Courts below; that for non-performance of an agreement to sell, an adequate relief for compensation is money, but the High Court as well as the trial Court have neglected such aspect of the matter and wrongly decreed the suit.

9. Learned counsel for the petitioners has added that both the Courts below have failed to appreciate Clauses No. 2 and 4 of the agreement to sell and emphasised that it was the second party/Respondent No.1, who himself had to make the payment of the remaining amount of the sale consideration from his own bank account; the impugned judgment of the High Court has been passed in haphazard



and slipshod manner, without applying the judicial mind resulting into grave miscarriage of justice; that the petitioners have fulfilled their obligation in order to obtain the NOC from CDA in terms of sale agreement but the same was not so done due to breach of contract committed by Respondent No.1.

10. The learned counsel for the petitioners further added that specific performance is a discretionary relief under which the contract is made in order to give plaintiff/Respondent No.1 unfair advantage over the defendants/petitioners in the present matter; in evidence it is proved that the plaintiff/Respondent No.1 is an investor and he is not an innocent and *bona fide* purchaser of the subject plaza and by practicing deceitful/fraudulent acts so also misrepresentation with Petitioner No.2, an overseas Pakistani having British Nationality, entered into a sale agreement, which is liable to be set aside.

11. Learned counsel for the petitioners has concluded that refusal of petitioners to receive the pay orders from aliens/unknown persons was sufficient to prove the element of breach of contract by Respondent No.1 to re-sale the said plaza prior to completion of the transaction. In the impugned judgment, it was wrongly emphasized upon receipts of two pay orders (*token money*) from aliens/unknown persons having no justification to receive 08 other pay orders, mentioned above, of remaining amount.

12. Per learned counsel for the petitioners Muhammad Azeem Khan, attorney of the Respondent No.1, lodged an FIR No.384 dated 23.11.2017 under Sections 380, 506, 447 and 34 of PPC at Police Station Industrial Area, Islamabad against Dr. Farooq Ahmed, the real brother of the petitioners, with the intention to forcibly takeover the possession of the subject plaza. The said FIR was quashed by the Islamabad High,

Court *vide* judgment dated 05.07.2018, passed in Writ Petition No.1203 of 2018. In support of his contentions, reliance is placed to the cases reported as Muhammad Abdul Rehman Qureshi vs. Sagheer Ahmad (2017 SCMR 1696) and Mallik Imam Bakhsh vs. Muhammad Sagheer Bakhsh (2017 SCMR 516). He urged that wrong and *mala fide* conduct of Respondent No.1 disentitle him to get the discretionary relief as has been given to him by the Courts below.

13. We have heard the learned counsel for the petitioners and scanned the material available on the record with his able assistance.

14. The undeniable facts of the case, which are essential for consideration, are as follows: -

- i) The petitioners have not denied the sale agreement dated 26.01.2017, entered in between the petitioners and Respondent No.1 regarding the purchase of the subject plaza and receipt of part payment of Rs.10,000,000/- (ten million) by way of pay order. Again the petitioners and Respondent No.1 agreed for the continuation of the sale agreement by executing another agreement duly signed by Petitioner No.2 and Respondent No.1; and
- ii) After receipt of further amount of Rs.5,000,000/- (five million), thereby extended the date of finalization of the transaction in between the parties up-to 15.06.2017. The aforesaid amount was paid by Respondent No.1 through a pay order.

15. It is a matter of record that Respondent No.1 arranged the remaining sale consideration in the shape of different pay orders as per details mentioned above. Petitioners refused to receive those pay orders and to transfer the subject plaza on the pretext that the remaining sale

consideration should have been paid from his own personal account of Respondent No.1.

16. The reason for filing of the suit for specific performance by Respondent No.1 was that the petitioners had refused to receive the pay orders of the balance sale consideration from Respondent No.1 before cutoff date on the premise that the pay orders have not been issued by Respondent No.1 from his own personal account, rather those were issued from the accounts of persons who are aliens to the petitioners but according to Respondent No.1 those were friends and relatives/brother of Respondent No.1. It appears from the record that cutoff date of the first agreement entered in between the petitioners and Respondent No.1 was 27.04.2017. However, on 22.05.2017 the continuation agreement was entered/executed in between Respondent No.1 and Petitioner No.2 (*when he was present in Pakistan*), and the cutoff date for the specific performance was extended, by consent, upto 15.06.2017. Respondent No.1 arranged the remaining sale consideration in the shape of pay orders in the name of Petitioner No.2 and approached the petitioners to comply with the terms of the agreement and after receiving the balance sale consideration transfer the subject plaza in favour of Respondent No.1.

17. On bare perusal of Clauses No.2 and 4 of the agreement initially entered in between the parties, we do not find any condition, which could establish that Respondent No.1 was required to pay the remaining sale consideration from his own personal bank account. The remaining amount of sale consideration had to be paid by Respondent No.1 within the stipulated period in terms of the agreement to sell and extended agreement to sell.

18. The petitioners never raised any objection when Respondent No.1 paid the pay order of earnest/advance money of Rs.10,000,000/-

(ten million) to the petitioners in respect of the subject plaza from the account of Muhammad Nauman Abbasi, whereas Respondent No.1 paid the additional amount of earnest money of Rs.5,000,000/- (five million) through pay order in the name of Petitioner No.2 from the account of brother of Respondent No.1, namely, Ameer Badshah; both pay orders issued by the relatives/friend of Respondent No.1 were duly received by Petitioner No.2 without raising any objection and the amount was transferred in his Bank Account. In order to avoid the specific performance of the agreements, the petitioners have taken an afterthought plea that has not been impliedly or expressly mentioned in the initial agreement to sell and/or extended agreement, to the effect that Respondent No.1 shall pay the sale consideration through pay orders from his own personal bank account.

19. It is well established from the record that Respondent No.1 has already paid/deposited the balance sale consideration in the trial Court on 22.02.2019, pursuant to the direction *vide* order dated 09.02.2019. The conduct of Respondent No.1 establishes that before filing of the suit as well as prior to cutoff date, he managed to get the pay orders of the balance sale consideration prepared in the name of Petitioner No.2, but the petitioners without any justifiable reasons avoided to accept/receive those pay orders. Consequently, Respondent No.1 as per the direction of the trial Court *vide* order dated 09.02.2019 deposited the balance sale consideration in respect of the subject plaza in the Court on 22.02.2019.

20. Another aspect of the matter is that the petitioners have failed to obtain NOC for the transfer of the subject plaza from Respondent No.2 and had utilized the earnest money paid to them by Respondent No.1, in CDA auction proceedings, and got interest on that amount from the bank, hence caused huge loss to Respondent No.1 and



correspondingly got profit/mark up on the advance money from the bank.

21. The petitioners took a plea in their defence before the trial Court that the petitioners were ready to complete the process of transfer of the subject plaza, therefore, Petitioner No.2 visited Pakistan but due to default of payment of balance sale consideration by Respondent No.1 from his own personal account, the deal could not be matured/finalized.

We, on perusal of the record, find that the petitioners were required to obtain NOC from Respondent No.2 before the cutoff date of the initial agreement and/or extended agreement but they have failed to place on record any document that they had applied for the NOC immediately after the execution of the agreements, which the petitioners were duty bound to do so. It was brought on record during the evidence before the trial Court that NOC in respect of the subject plaza was not issued upto 22.05.2017. The plea of the petitioners is that Respondent No.1 has entered into back-to-back transactions of the subject plaza before the completion of the earlier transaction and therefore, violated the terms of the agreement to sell.

22. As per the learned counsel for the petitioners, Respondent No.1 sold out the subject plaza to one Muhammad Azeem Khan even before the finalization of the transaction entered in between the parties and has placed reliance at Page No.151 of the paper-book, a receipt of payment of *biana* of Rs.15,000,000/- (Exh.D-5), paid on 23.01.2017 by Muhammad Azeem Khan to Respondent No.1. On examining that document, it is found that the said transaction was finalized even before the date of agreement i.e. 26.01.2017. Hence, after the conclusion of the agreement to sell dated 26.01.2017, the receipt as referred to above, has no importance. *Qua* document Exh.D-5, it is mentioned that Respondent

No.1 had sold out the subject plaza to Muhammad Azeem Khan before the finalization of the agreements produced in the evidence before the trial Court as Exh.P-1 and Exh.P-15. Even otherwise, Exh.P-5 established that Respondent No.1 was the purchaser and not the seller of the subject plaza. The petitioners seem to be under misconception that Respondent No.1 has made back-to-back transactions of the subject plaza. Petitioner No.2, who appeared as DW-1 during his cross-examination before the trial Court, admitted that Respondent No.1 ever made back-to-back transactions of the subject plaza.

23. With regard to the objection raised by the learned counsel for the petitioners that Respondent No.1 purchased the subject plaza for investment purposes for that he made an agreement to sell with one Muhammad Azeem Khan, therefore, Respondent No.1 is not entitled for the decree of specific performance of the agreements. We find that the petitioners have failed to produce in evidence any document, which could establish that Respondent No.1 purchased the subject plaza for investment or re-sale purposes. As discussed earlier, the agreement in between Respondent No.1 and Muhammad Azeem Khan was prior to the agreement to sell entered in between the petitioners and Respondent No.1. The trial Court for that purpose has already framed Issue No.3-C, and answered in the negative holding that the parties to the agreement to sale entered into the transaction with their free consent for a lawful consideration/object. Both the parties were competent to contract and none of the parties had any disqualification for entering into the contract as pointed out by the petitioners. The petitioners had failed to provide in evidence any single document, which could establish that any fraud or misrepresentation was played by Respondent No.1 in the conclusion of the agreements entered in between the parties, which concluded that there was free consent in between the parties while executing such

agreements/contracts. The subject plaza was sold by the petitioners for a huge sale consideration of Rs.80,000,000/- (eighty million) and Respondent No.1 paid the earnest money of Rs.15,000,000/- (fifteen million) in two parts through pay orders to the petitioners and the remaining amount of the sale consideration was ready in the shape of different pay orders prepared in the name of Petitioner No.2 but they refused/avoided to receive and acknowledge those pay orders and failed to perform the agreements. Even otherwise, Respondent No.1 has deposited the balance sale consideration in the trial Court which was in the knowledge of the petitioners.

24. We have observed that there are concurrent findings of the Courts below. The suit filed by Respondent No.1 was decreed because the execution of the agreements was established. The position that now emerges is that Respondent No.1 through his evidence and that of his witnesses has proved the execution of the agreements to sell, payment of earnest money of Rs.15,000,000/- (fifteen million) and preparation of pay orders in the name of Petitioner No.2 towards the balance sale consideration. It is also apparent from the record that Respondent No.1 has deposited the balance sale consideration per the direction of the trial Court. The petitioners have admitted the execution of both the agreements; receipt of token money in the shape of pay orders from Respondent No.1 and preparation of pay orders in the name of Petitioner No.2 but raised an objection that the same have not been prepared from the personal bank account of Respondent No.1.

25. We have also observed that Respondent No.1 has been able to prove that he tendered to the petitioners the payments/dues and has produced the details of the pay orders prepared in the name of petitioner No.2 in respect of the balance sale consideration.

26. In such circumstances, we are of the firm view that Respondent No.1 has proved that he honoured his commitments and fulfilled his obligation as agreed upon in between the parties *qua* agreements. Even otherwise, it is now well settled that where the vendor refuses to accept the sale consideration amount, the vendee seeking a specific performance of the agreement to sell is essentially required to deposit the amount in the Court. The vendee has to demonstrate that he has been at all relevant times ready and willing to pay the amount and to show the availability of the amount with him. A vendee cannot seek enforcement of reciprocal obligation of the vendor unless he is able to demonstrate that not only his willingness but also his capability to fulfil his obligations under the contract. In the instant case, Respondent No.1 proved that he was ready to make payments through pay orders in the name of petitioner No.2 and he attempted to pay those to the petitioners, but they wilfully refused and avoided to receive the same. However, respondent No.1 deposited the balance sale consideration in the trial Court.

27. On careful perusal of the judgments of the trial Court as well as the appellate Court, we find that both the *fora* below have considered all aspects of the matter, either legal or factual, and have referred to and discussed not only the judgments of this Court but also judgments of the superior Courts of different foreign countries, in detail, which are relevant in deciding the issue involved in the matter. The case law cited at the bar by the learned for the petitioners at the time of hearing is not relevant to the issue in hand.

28. We have no hesitation in holding that the petitioners could not establish their stance through cogent, reliable and confidence inspiring evidence; besides no perversity, illegality or irregularity has



been pointed out by the learned counsel for the petitioners which could persuade us to interfere in the impugned judgment.

29. For what has been discussed above, the petition lacking in merit is dismissed and leave to appeal is declined.

Bench-V  
Islamabad  
16.11.2023  
~~NOT~~ APPROVED FOR REPORTING  
Rabbani\*/