

CIVIL REVISION NO.1904 OF 2011.

Mst. Nazeer Begum (deceased) through L.Rs. etc. Shahid Ehsan Elahi etc.

08.06.2011 Ch. Mushtaq Ahmad Khan, Advocate for the
petitioners.

This Civil Revision is directed against the order dated 31.05.2011 passed by the learned Civil Judge 1st Class Sialkot whereby an application moved under Order VII Rule 11 of CPC by the present petitioners who are respectively defendants No.1 to 5 in the suit pending in the said court was dismissed.

2. The respondent Shahid Ehsan Elahi instituted a suit for possession through specific performance as well as for perpetual injunction against the present petitioners on 06.05.2006 before the learned Civil Judge Sialkot. It was contended in the plaint that the respondents No.1 to 4 through their general attorney Ch. Muhammad Mansha being the real brother of the said defendants entered into an agreement to sell dated 26.2.2005 with the plaintiff of the suit in respect of land measuring 4 kanals bearing Khewat No.81, Khatoni Nos. 227 to 230, Khasra Nos. 351 (4 kanals 15 marlas), 607 (5 kanals 4 marlas), 677 (0 kanals 8 marlas), 651 (8 kanals 3 marlas) and 617(8 kanals 6 marlas) as per Jamabandi for the year 1997-1998 for a consideration of Rs.51,20,000/-. It was further contended by the plaintiff/respondent that a sum of Rs.16,00,000/-was paid to the said attorney of the defendants as earnest money. It was further contended that an amount of Rs.300,000/-was paid through two cheques one bearing No.CA.1337979 dated 15.1.2005 for Rs.100,000/-and second bearing No.CA.1330831 dated 11.2.2005 for Rs.200,000/- out of the earnest money of Rs.16,00,000/-. It was further contended that the remaining amount of earnest money was paid in cash in

presence of the marginal witnesses of the agreement to sell dated 26.2.2005. The defendants No.1 to 4 of the suit were to execute a registered sale deed in favour of the plaintiff by 25.9.2005. It was further agreed in the agreement that in case the land measuring 4 kanals as described in paragraph 1 could not be carved out in the shape of a rectangle from the land belonging to the defendants No.1 to 4 from the Khasra numbers mentioned above, the other real brother of the defendants Ch. Muhammad Anwar impleaded as the defendant No.5 would be bound to make up the deficiency from his land. The said Ch. Muhammad Anwar was also thus signatory of the agreement. The plaintiff of the suit contended that he has been willing and ready to perform his part of the agreement and to pay the balance sale consideration at the time of execution of the registered sale deed before the Sub Registrar but the defendants No.1 to 4 and their attorney went back upon their commitments. Resultantly the suit was instituted for possession through specific performance of the subject land.

3. The suit was contested by the petitioners who submitted a joint written statement dated 14.6.2006. The preliminary objections No.6 and 7 raised in the written statement by the petitioners/defendants are very important which are reproduced below:-

- “6. That the plaintiff has not filed this suit within stipulated time which is essence of the contract incorporated in the agreement dated 26.2.2005, hence the suit is liable to be dismissed with costs.*
- 7. That the plaintiff has failed to fulfil the terms and conditions of the contract and is therefore not entitled for the decree prayed for.”*

In paragraph No.1 on facts the execution of agreement to sell dated 26.2.2005 was admitted but the plea was taken that it was not entered through their general attorney but through their brother who was a simple attorney of the defendants No.1 to 4. The payment of Rs.300,000/- out of the earnest money through two cheques was also admitted but the payment of the remaining

amount of Rs.13,00,000/- in cash out of the earnest money was denied. In paragraph No.2 of the written statement on facts the petitioners/defendants further admitted as correct that the date of 25.9.2005 was fixed for the execution of the sale deed on the payment of remaining sale price and that the time fixed in the agreement was the essence of the contract. The commitment raised in the plaint with respect to Ch. Muhammad Anwar the defendant No.5 were however denied by the petitioners/defendants in paragraph No.2 of the written statement. Thus the petitioners/defendants took up the plea that it is the plaintiff who has resiled from his commitment therefore he is not entitled to the decree as prayed for and the suit was requested to be dismissed.

4. It transpires from the perusal of the record that an amended written statement dated 18.11.2009 was also submitted with the same contentions as raised in the earlier written statement.

5. The present petitioners then moved an application under Order VII Rule 11 of CPC dated 24.2.2011 by contending that in view of the latest judgment reported as **2010 SCMR 334** it has been laid down that a unilateral agreement not signed by the vendee of a transaction which agreement created reciprocal contractual obligations a decree for the specific performance cannot be granted in a suit therefore the instant suit as instituted be dismissed. This application was contested by the respondent. The learned Civil Judge/trial court rejected the application vide impugned order dated 31.5.2011. Hence this Civil Revision.

6. It is contended by the learned counsel for the petitioners that in view of the latest pronouncement of law by the honourable Supreme Court of Pakistan reported as 2010 SCMR 334 if an agreement to sell is not signed by one of the parties therefore the suit was liable to be dismissed; that in such a situation the plaint of the present suit was liable to be rejected under Order VII Rule 11 of CPC. The learned counsel for the petitioners thus laid much stress upon the judgment reported as **Mst. GULSHAN HAMID VS.**

Kh. ABDUL REHMAN AND OTHERS(2010 SCMR 334) in support of his contentions. He has also relied upon the judgments reported as **BURMAH EASTERN LTD VS. BURMAH EASTERN EMPLOYEES, UNION AND OTHERS** (PLD 1967 Dacca 190), **S.M. SHAFI AHMAD ZAIDI THROUGH LEGAL HEIRS VS. MALIK HASSAN ALI KHAN (MOIN) THROUGH LEGAL HEIRS** (2002 SCMR 338), **KHALID MAHMOOD AND 3 OTHERS VS. MUHAMMAD YASEEN** (1988 MLD 1850), **DOST MUHAMMAD VS. KHAIR MUHAMMAD AND 2 OTHERS** (PLD 2006 Lahore 727), **ABDUL REHMAN VS. SHER ZAMAN AND ANOTHER** (2004 CLC1340) and **MST. SARWAR JAN AND 8 OTHERS VS. DISTRICT JUDGE, BAGH AND OTHERS** (2006 MLD12) to contend that a still-born suit should be buried at its inception and therefore the present suit be dismissed as it is not further proceedable and that the plaint is liable to be rejected which power can even be exercised by this Court at the revisional stage.

7. I have considered the arguments of the learned counsel for the petitioners.

8. It is well settled proposition of law that for the purpose of applying the provisions of order VII Rule 11 of CPC the contents of the plaint are to be read only and if after accepting the same is all correct no cause of action is made out it is only then the plaint of such a suit can be lawfully rejected. In the instant case as narrated in plaint point out undoubtedly that it is a simple suit for specific performance of an agreement to sell dated 26.2.2005 which agreement to sell has been admitted in their written statement by the present petitioners to have been executed by them through their real brother and attorney. So the plaint and its contents did disclose a cause of action on a plain reading therefore the plaint was not liable to be rejected on this simple score. The judgment reported as **2010 SCMR 334** is distinguishable on its own facts. In paragraph No.6 of the reported judgment at page 338 the honourable Supreme Court of Pakistan has recorded the following reasons for deciding the matter which is reproduced below:-

“A perusal of the deed would indicate that it was signed by the appellant Mst. Gulshan Hamid alone and not by any of the three vendees. As is evident from the contents of the deed, it created rights and liabilities on both sides. Had there been an occasion for the owner-lady to bring a suit for specific performance, she would not have succeeded because the vendees had not signed the deed so as to accept any of the liabilities. The circumstances under which the contract is made are such that the present plaintiffs are given an unfair advantage over the defendant. Section 22 of the Specific Relief Act, 1877 clearly provides that in such circumstances, the discretion is not to be exercised in favour of the plaintiffs. For ready reference section 22 (clause-I) is reproduced as follows:-

“22. Discretion as to decreeing specific performance.- - -The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance:

1. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff’s part.”

Further in paragraph No.8 of the judgment the facts and circumstances of the said case which prevailed with the honourable Supreme of Pakistan for passing of the judgment were narrated with particularity which paragraph is also reproduced below:-

“The evidence shows that the three plaintiffs belonging to Sialkot and having the blessings of local property dealers brought a lady-owner around in such a manner so as to take unfair advantage. They kept themselves immune from any future claim of the opposite party by not signing the deal at all. It is admitted in the evidence that the plaintiffs had tampered with the document. It is admitted in the evidence that the document was executed by the

lady at Islamabad. It is surprising to observe that it was attested on 18.6.1986 by an Oath Commissioner at Sialkot, in the absence of the deponent executant. The plaintiffs have, thereby, resorted to forgery as well. We are of the firm view that in the very construction of the agreement, it was not mutually enforceable and hence no decree of specific performance could be granted.”

9. In the facts and circumstances of the present case the agreement to sell dated 26.2.2005 has been admitted by the present petitioners in their written statement and the agreement to sell is duly signed by the defendants No.1 to 4 through their attorney Ch.Muhammad Mansha. The plaintiff did not deny the agreement to sell in the plaint. No allegation of forgery was levelled by any of the parties in respect of the agreement in question and the only plea which has been taken by the defendants of the suit in their written statement is that the agreement in question has lost its efficacy due to flux of time. It is an ordinary suit for specific performance of an agreement to sell which suit was instituted in the year 2006. The issues in this matter were framed by the learned Civil Judge on 18.10.2006 and the evidence of the plaintiff is also stated to have been completely recorded. The agreement to sell also did not apparently create any reciprocal obligations for both the parties to the suit and therefore no difficulty could have arisen in case the defendants of the suit had instituted any suit if at all on the basis of agreement to sell and the same could not have been dismissed on the ground that the vendee Shahid Ehsan Elahi had not signed it. The other case law cited by the learned counsel for the petitioners that frivolous suit is to be dismissed right at the inception stage of the proceedings have no application to the facts and circumstances of the instant case. Even the question of rejection of plaint at the revisional stage also does not arise in the instant matter.

10. The learned Civil Judge has recorded valid reasons in the impugned order dated 31.5.2011 for dismissing the application moved by the present petitioners under Order VII Rule 11 of CPC

which application was moved after about five years of the institution of the suit. The order of the learned Civil Judge is perfectly legal and calls for no interference by this Court in exercise of its revisional jurisdiction. The instant Civil Revision is devoid of any force and is **dismissed** in *limine*.

(NASIR SAEED SHEIKH)
JUDGE.
Special Bench Civil-I

Approved for Reporting

AMJAD