JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No.53 of 2018
Rab Nawaz
Versus
Naseer Hussain Shah and others

Date of Hearing:	04.04.2024
Appellant by:	M/s Zulfiqar Ali Abbasi and Shahid Munir, Advocates.
Respondents by:	Qazi Rafi-ud-Din Babar, Advocate for respondents No.1 and 2.

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal, the appellant, Rab Nawaz, impugns the order dated 23.05.2018 passed by the Court of the learned Civil Judge (East), Islamabad, whereby his application under order XXXIX, Rules 1 and 2 of the Code of Civil Procedure, 1908 (**"CPC"**), was dismissed. The said application was filed along with the appellant's suit for specific performance and permanent injunction.

2. The facts essential for the disposal of the instant appeal are that on 13.06.2014, an agreement to sell was executed between the appellant and respondent No.1 (Naseer Hussain Shah), whereby the latter agreed to sell to the former land measuring 02 *kanals*, 05 *marlas* in *khasra* Nos.2433 and 2433/1 in Revenue Estate Mohra Noor, Tehsil and District Islamabad (**"the suit land"**) for a total sale consideration of Rs.67,50,000/-. An amount of Rs.15,00,000/- was paid as an earnest money at the time of the execution of the said agreement, whereas the balance amount of Rs.52,50,000/- was agreed to be paid by 09.09.2014 at the time of the transfer of the said land.

3. After the execution of the said agreement, disputes developed between the appellant and respondent No.1 resulting in the institution of a suit for specific performance on 20.09.2014 before the Court of the learned Civil Judge, Islamabad by the

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appellant. During the pendency of the said suit, the contesting parties are said to have arrived at a compromise. On 18.11.2014, the learned Civil Court recorded the statements of the learned counsel for the contesting parties to the effect that the said parties had resolved their disputes through a compromise. Consequently, vide order dated 18.11.2014, the said suit was dismissed as withdrawn. In the said order, it is mentioned that the plaintiff's statement to the effect that a compromise had been affected between the parties, had been recorded.

4. The appellant's stance is that after the execution of the agreement to sell, he came to know that the suit land was not entirely owned by respondent No.1; that respondent No.1 owned 01 *kanal*, 07 ½ *marlas* instead of 02 *kanals*, 05 *marlas*; that the remaining suit land was owned by his uncle, Syed Abid Hussain Shah Bukhari, who had undertaken to transfer the remaining suit land to the appellant. The appellant further asserts that as respondent No.1 and Syed Abid Hussain Shah Bukhari did not abide by the terms of the compromise, the appellant, on 24.02.2016, filed another suit for specific performance of the said agreement to sell dated 13.06.2014. In this suit, the appellant had also impleaded Syed Abid Hussain Shah Bukhari as defendant No.2. Along with the said suit, the appellant filed an application for interim injunction, which was dismissed vide order dated 23.05.2018 on the sole ground that the earlier suit had been unconditionally withdrawn by the appellant. The said order dated 23.05.2018 has been assailed by the appellant in the instant appeal.

5. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that since respondents No.1 and 2 had not abided by the terms of the compromise to transfer the entire suit land to the appellant on the payment of the remaining sale consideration, the appellant was justified in filing the second suit; that the first suit had been withdrawn on the basis of a compromise arrived at between the

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parties and the order sheet of the learned Civil Court of 18.11.2014 bears the signatures of the learned counsel for respondent No.1; that the breach of the terms of the compromise had furnished the appellant with a fresh cause of action to institute the second suit; and that since respondents No.1 and 2 had admitted the execution of the agreement to sell dated 13.06.2014 as well as the receipt of the earnest money, the learned Civil Court ought to have allowed the appellant's application for interim injunction. Learned counsel for the appellant prayed for the appeal to be allowed and to restrain the respondents from alienating the suit land. In making his submissions, learned counsel for the appellant placed reliance on the judgments reported as *2019 YLR 2778, 2013 CLC 659, 2013 MLD 415, 2011 YLR 1357, 2010 YLR 984, 1993 SCMR 374, PLD 1983 SC 344, 1992 MLD 251* and *2006 AC 290*.

6. On the other hand, learned counsel for respondents No.1 and 2 submitted that a written compromise was never executed between the parties; that the terms of the compromise were never produced before the learned Civil Court; that the compromise between the parties was for the return of the earnest money but there was dispute between the parties over the quantum of interest that had to be paid; that at no material stage did respondent No.2 agree to the transfer of his share in the suit land to the appellant; that the agreement to sell dated 13.06.2014 cannot be enforced against respondent No.2, who is not a party to the same; and that since the appellant had unconditionally withdrawn the first suit, the second suit instituted by him on 24.02.2016 would be barred under Order XXIII, Rules 1 and 2 CPC. Learned counsel for respondents No.1 and 2 prayed for the appeal to be dismissed. In making his submissions, learned counsel for respondents No.1 and 2 placed reliance on the judgments reported as *2001 SCJ 204, PLD 2001 SC 325, 2010 CLC 642, PLJ 2011 Lahore 520, 2003 YLR 1450, NLR 1995 SCJ 806* and *2016 CLC 896*.

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7. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 4 above and need not be recapitulated.

8. There is no denying the fact that the suit for specific performance instituted by the appellant on 20.09.2014 was dismissed as withdrawn vide order dated 18.11.2014 passed by the learned Civil Court. Perusal of the said order shows that the learned Civil Court had not granted the appellant permission to file a fresh suit. Although there is reference to a compromise having been arrived at between the parties, but neither were the terms of the said compromise reduced into writing nor was any judgment or decree passed in terms of a compromise.

9. The second suit was instituted by the appellant on 24.02.2016 by taking the position that respondents No.1 and 2 had not abided by their commitment to transfer the suit land to the appellant on receipt of the remaining sale consideration of Rs.52,50,000/-. Learned counsel for respondents No.1 and 2 disputes the assertion made by the appellant as to the terms of the compromise. It is yet to be proved through evidence as to what the terms of the compromise were before it could be determined as to which party had breached the terms of such compromise. In other words, the appellant will have to prove through evidence that there was compromise to the effect that respondents No.1 and 2 would transfer the suit land on receipt of the remaining sale consideration. Since the terms of the oral compromise are yet to be proved by the appellant, I would tend to agree with the learned Civil Court that the appellant was not entitled to the interim relief prayed for in his application under Order XXXIX, Rules 1 and 2 CPC. It may, however, be mentioned that the doctrine of *lis pendens* adequately protects the appellant to the extent of the suit land owned by respondent No.1.

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10. Since I do not find any merit in the instant appeal, the same is dismissed with no order as to costs.

11. Before parting with this judgment, it may be mentioned that the instant appeal was filed on 26.05.2018. An interim order was passed by this Court on 28.05.2018. It was after five long years that the appeal was fixed for hearing and during all this time, the interim order passed by this Court continued in operation. Office is once again directed in categorical terms that all those cases in which an interim order is passed by this Court and the next date of hearing is not fixed by Court, such cases should be fixed within three months of the date when the case is either adjourned or delisted. Office shall place this judgment before the Additional Registrar (Judicial) of this Court, who shall ensure strict compliance with this judgment.

12. The contesting parties were asked as to the progress made in the suit in the previous five years. They were in unison on their submission that hardly any progress had been made. The Courts ought not to stay proceedings in the suit when there is no specific order for the stay of proceedings passed by a higher forum. In the case at hand, interim relief had been granted by this Court on the appellant's application for injunction and not stay of proceedings. Office shall transmit a copy of this judgment to the learned Trial Court, who shall proceed with the suit expeditiously and conclude the same preferably within a period of two months from the date of the receipt of this judgment.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 08.04.2024.

(JUDGE)

*Ahtesham**

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