IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present
Mr. Justice Amin-ud-Din Khan
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Irfan Saadat Khan

AFR.

Civil Appeal No.785 of 2022
Against the judgment dated 04.07.2022 passed by the Islamabad High Court in RFA No. 117 of 2021.

Ufaid Gul ....*Appellant*

Versus

Mst. Farkhanda Ayub Khan and others ....*Respondents*

For the Appellant:	Syed Asghar Hussain Sabzwari, Sr.ASC. Sardar Muhammad Tariq Farid Gopang, ASC.
For the respondents:	Mr. Taimoor Aslam Khan, ASC for respondent No.1. Raja Khalid Mahmood Khan, ASC for respondent No. 3.
Assisted by:	Miss Maira Hassan, Judicial Law Clerk.
Date of Hearing:	23 September 2024

ORDER

AMIN-UD-DIN KHAN, J. Through this appeal filed under Article 185(2)(d)(e) of the Constitution of Islamic Republic of Pakistan, 1973 judgment and decree dated 04.07.2022 passed by the Islamabad High Court has been challenged whereby RFA No. 117 of 2021 filed by respondent No.1 was allowed and judgment and decree of the trial court decreeing the suit was set aside.

2. Brief facts are that plaintiff-appellant on 30.04.2013 filed a suit for specific performance on the basis of agreement to sell dated 06.11.2012 by defendant No.1/respondent No.2 stating that through an agreement in favour of the plaintiff/appellant House/Plot No. 10, Street No. 40, Sector G-10/4, Islamabad has been agreed to sale for a consideration amount Rs:1,65,00,000/-. The same has been admitted by defendant No.2/respondent No.1 and an amount of Rs:5,00,000/- was given to the defendants. Defendant No. 3 was the Chairman, CDA,

Islamabad. In para 2 of the plaint, it is pleaded that at the time of agreement defendant No. 1 showed himself to be the owner of the plot along with the house upon the said plot whereas now plaintiff came to know that defendant No. 2 is the owner of the suit property. In the written statement defendant No. 1 raised the preliminary objection that plaintiff with malafide intention and ulterior motive, dishonestly pressurized respondent No. 1 to enter into an agreement dated 6.11.2012, which was without permission of defendant No.2, therefore, contested the suit. In the written statement filed by defendant No.2 an objection was raised that the plaint is liable to be rejected as it does not show cause of action against the owner of property defendant No.2 whereas all the other facts were denied and prayer for dismissal of the suit was made. The learned trial court framed the issues and invited the parties to produce evidence. Both the parties produced their respective evidence. Learned trial court was pleased to decree the suit as prayed for vide judgment and decree dated 13.3.2018. The judgment debtor/defendant No.2 challenged the judgment and decree of the learned trial court through civil appeal which was filed before the learned District Judge (West), Islamabad bearing Appeal No. 34 of 2018, the same was allowed vide judgment and decree dated 9.7.2018 in terms that the suit filed by the plaintiff was dismissed to the extent of relief qua specific performance of agreement, however, it was declared that the appellant i.e. defendant No. 2 will return an amount of Rs:10,00,000/- to the plaintiff as it was proved by the plaintiff that cheque of Rs:5,00,000/- was deposited in her account. All the three parties i.e. plaintiff as well as defendant Nos. 1 & 2 feeling aggrieved filed their separate Civil Revisions i.e. CR.No.269 of 2018, CR.No.316 of 2018 and CR.No.318 of 2018. All the three Civil Revisions were decided vide consolidated judgment dated 29.01.2019 holding that the learned ADJ-III (West) having no pecuniary jurisdiction to adjudicate upon the appeal as the value of the suit was Rs:1,65,00,000/- and same was beyond the pecuniary jurisdiction of the learned ADJ. Defendants Nos. 1 & 2 were directed to approach the competent forum. Another fact of the matter is that against the ex-parte judgment and decree defendant No.2 filed an application under Order IX Rule 13 read with sections 12(2) and 151 of the CPC against the judgment dated 13.3.2018 on 9.4.2019 which was replied to by the plaintiff on 12.4.2019. Learned Civil Judge, Islamabad was pleased to accept the

application of defendant No.2 vide order dated 25.4.2019 and set aside the judgment and decree dated 13.3.2018. Plaintiff being aggrieved by the order dated 25.4.2019 assailed the same through CR.No.209 of 2019 which was allowed vide judgment dated 25.1.2021 by holding that the respondent/defendant No.2/judgment debtor if feel aggrieved has to follow the course of action referred in Civil Revision Nos. 269, 316 and 318 of 2018 and may file Regular First Appeal afresh before the High Court subject to all just and legal exceptions, therefore, defendant No.2/judgment debtor filed RFA No. 117/2021 before the High Court against the judgment and decree dated 13.3.2018, which was allowed through the impugned judgment and decree. Hence, instant appeal by the plaintiff.

3. Learned counsel for the appellant has mainly addressed the Court with regard to technicalities of filing an appeal before the wrong forum and therefore stated that when the forum i.e. the High Court which was having jurisdiction to entertain and try the appeal, the appeal was filed in the High Court, with an inordinate delay, therefore, the appeal was liable to be dismissed. On merits, learned counsel states that when defendant No.1 showed himself to be the owner of the suit property, therefore, he entered into an agreement to sell with him but states that cheque issued for an amount of Rs:5,00,000/- was deposited in the Bank account of the owner i.e. defendant No.2, therefore, his suit was rightly decreed by the learned trial court.

4. On the other hand, learned counsel for the respondent who has filed CMA No. 8013 of 2024 for additional documents, argues that even if there was negligence on the part of defendant No.2/judgment debtor, the office of the learned ADJ and thereafter the Court was bound to return the appeal when it was filed in a forum which was having no pecuniary jurisdiction. In this view, it becomes a contributory negligence of the Court and defendant No.1/respondent, therefore, the learned High Court has rightly discussed in detail all the facts and came to the conclusion that the decree granted in favour of the plaintiff/appellant was not sustainable.

5. For the time being keeping aside the technical aspects of the case on merits there is absolutely no valid claim of the appellant as he entered into an agreement with a person who has absolutely no concern whatsoever with the suit property, only the fact that cheque of

Rs:5,00,000/- was deposited in the account of the owner i.e. defendant No.2/respondent herein does not make the plaintiff-appellant entitled for grant of a decree for specific performance in his favour when only a cheque of meager amount was deposited in her account, whereas total consideration amount as per the plaintiff-appellant was Rs:1,65,00,000/-. In a suit for specific performance grant of decree is a discretionary relief with the court. If the court comes to the conclusion that in grant of a decree equity leans in favour of the plaintiff then decree can be granted, otherwise, it is discretion of the court, even if the plaintiff has proved the agreement to sell even then it is discretion with the court to grant a decree or refuse thereof. In these circumstances so far as merits of the case are concerned that the grant of a decree for specific performance in favour of plaintiff against defendant No. 2 by the learned trial court was absolutely nullity in the eye of law when plaintiff does not claim agreement in his favour by defendant No.2 and further plaintiff admitting that defendant No. 1 entered into an agreement with him for sale of the suit property disentitles him even to make a prayer of grant of a decree for specific performance against defendant No.2. In these circumstances, the learned High Court has rightly accepted the appeal and set aside the judgment and decree passed by the learned trial court in favour of the present appellant and also taken care of the rights of the present appellant while asking the owner of the property to return rupees one million to the plaintiff on the ground that a cheque of Rs:5,00,000/- was deposited in the account of the owner i.e. defendant No.2.

6. So far as the technical aspect is concerned, contributory negligence on the part of both the appellant and the court is evident. As per the principle laid down in Sherin and others v. Fazal Muhammad and others (1995 SCMR 584), where a party, despite acting with reasonable diligence, is misled by the court or fails to receive timely guidance about jurisdictional matters, the resulting delay or error is not entirely attributable to that party. In the present case, defendant No.2/respondent No.1 initially filed the appeal before a forum lacking pecuniary jurisdiction, i.e., the learned Additional District Judge (West), Islamabad. However, the court itself, despite lacking jurisdiction, entertained the appeal for a substantial period without raising the issue, thereby contributing to the delay. This situation falls squarely within the doctrine of contributory negligence,

where negligence by both the appellant and the court contributed to the procedural misstep. In light of this, the contributory negligence of the court in not promptly addressing the jurisdictional defect must be considered, and the defendant No.2/respondent No.1 cannot be deprived of relief solely on this ground. The High Court rightly held that the delay caused by filing before the wrong forum was not solely attributable to the defendant No.2/respondent No.1, and therefore, no further prejudice should be caused to the defendant No.2/respondent No.1 on this account. The principle that "an act of the court shall prejudice no one" finds application here, as established in Ghulam Ali v. Akbar alias Akoor and others (PLD 1991 SC 957), reinforcing the notion that the defendant No.2/respondent No.1's legal rights must be preserved despite procedural lapses induced by the court. Therefore, it is clear that if there was a contributory negligence of the person knocking the door of the court and by the court, the person knocking the wrong door cannot be deprived of his/her legal rights available under the law. In the instant case it is clear that it was contributory negligence of the court also, therefore, the condonation of delay and view taken by the High Court is correct.

7. In these circumstances, no case for interference is made out. Resultantly, this appeal stands dismissed with costs throughout.

Islamabad
23 September 2024.
Mazhar Javed Bhatti/Maira Hassan
APPROVED FOR REPORTING.