

**IN THE SUPREME COURT OF PAKISTAN**

(Appellate Jurisdiction)

**PRESENT:**

MR. JUSTICE SAYYED MAZHAR ALI AKBAR NAQVI  
MR. JUSTICE MUHAMMAD ALI MAZHAR  
MR. JUSTICE ATHAR MINALLAH

**CIVIL PETITION No. 3989 OF 2022**

(Appeal against the judgment dated  
05.10.2022 passed by Lahore High Court,  
Lahore in Civil Revision No.60593/2022)

M/s DW Pakistan (Private) Limited, Lahore ...Petitioner

**VERSUS**

Begum Anisa Fazl-i-Mahmood and others ...Respondents

For the Petitioner: Mr. Khalid Ishaq, ASC

For Respondents: Mr. Hafeez Saeed Akhtar, ASC

Date of Hearing: 08.12.2022

**JUDGMENT**

**MUHAMMAD ALI MAZHAR, J-** This Civil Petition for leave to appeal is directed against the order dated 05.10.2022, passed by the Lahore High Court in Civil Revision No.60593 of 2022 whereby the Civil Revision filed by the respondent No.1 to 6 was disposed of with certain directions to the learned Trial Court.

2. Compendiously, the facts *de rigueur* for the disposal of this Civil Petition are that on 05.07.2022 the petitioner filed a Civil Suit for the specific performance of an agreement to sell dated 09.11.2019 ("**Agreement**") for Bungalow No.S-19-R-128, the Mall, Lahore, measuring 15 Kanals, 09 Marlas and 132 Sq. Ft. ("**Suit Property**") in the Court of the Senior Civil Judge, Lahore against the respondent Nos. 1 to 6. The trial of the suit was assigned to the learned Civil Judge 1<sup>st</sup> Class, Lahore. While issuing notice for considering ad-interim relief, the learned Civil Judge, *vide* order dated 05.07.2022, passed an order to maintain the status quo subject to the deposit of the balance sale consideration amount till the next date of hearing. On 27.07.2022, the counsel for the parties appeared and the petitioner/plaintiff tendered a cheque bearing No. 04756235 dated 26.07.2022 amounting to Rs.5,855,005,000/- drawn on Dubai Islamic Bank Pakistan Limited, Clifton Branch, Karachi ("**Cheque**") along with the Bank Statement for substantiating the sufficiency of

funds in the Bank Account and the Trial Court handed it over to the officer of the Court to retain it in safe custody rather than encashing the same. Thereafter the respondents filed a Civil Revision in the Lahore High Court to assail the order dated 27.07.2022 which was taken up for hearing on 05.10.2022 and disposed with the direction to the learned Trial Court to deposit the subject matter cheque in a profit bearing account so that, at the conclusion of the trial, either of the parties may seek the benefit of the amount deposited pursuant to Court's order. The Petitioner filed an application under Order XLI, Rule 21 of the Code of Civil Procedure, 1908 ("**CPC**") for the re-hearing of the Revision Petition as it was heard and decided ex-parte, but the office raised some objections. However, after the clearance of the office objections, the Application filed by the petitioner was numbered and was put up for hearing before another learned Single Judge, as the learned Single Judge who passed the order was not available at the Principal Seat. According to the narrated facts, when the application was fixed, the learned counsel for the parties agreed that the Application may be heard by the same learned Judge who was previously seized of the matter and had passed the order. Consequently, the Hon'ble Chief Justice passed an administrative order that the application may be heard as and when the concerned learned Judge would be available at the Principal Seat but, in the meanwhile, the petitioner filed an application for the unconditional withdrawal of the Application and preferred to file this Civil Petition to challenge the impugned order.

3. The learned Counsel for the petitioner argued that that learned High Court failed to appreciate that the Civil Revision was not maintainable as there was no order of the Trial Court which could be construed as "Case Decided", hence there was no occasion to exercise the revisional jurisdiction under Section 115 of the CPC. It was further averred that petitioner was entitled to have an opportunity of hearing. He further contended that the impugned order imposed a direction to the Trial Court for encashment of the cheque for the balance sale consideration solely at the instance of the vendors which was unjustified. The vendors were not willing to perform their part of the Agreement and also denied the existence of a lawful Agreement. He further argued that the petitioner is ready and willing to perform its part of the reciprocal promise, but the respondents have failed to demonstrate their readiness and willingness to perform the

Agreement. The learned counsel further argued that there is no statutory requirement to deposit the balance sale consideration for seeking the specific performance of a contract in respect of an immovable property.

4. The learned counsel for the respondents No.1 to 6 argued that on 27.07.2022 the petitioner submitted a cheque, but the learned Trial Court, instead of encashing and depositing the amount in a profit bearing scheme, simply handed over the same to the *Ahlmad* of the Court for safe custody in order to avoid any possibility of misplacement or misappropriation. The order of the learned Trial Court was against the law laid down by the superior Courts, hence the Revision Application was filed in the High Court. It was further contended that unless the cheque is encashed, the financial strength of the petitioner could not be proved. The Trial Court had ignored the well-established principle that the buyer who seeks specific performance of a contract to sell is required to deposit the sale consideration amount in Court. The bank statement does not demonstrate the ability, readiness and capacity of the petitioner to pay the alleged sale consideration.

5. Heard the arguments. The initial order passed by the learned Trial Court in the pending *lis* demonstrates that the learned counsel for the petitioner in the Trial Court appeared with the Cheque along with the Bank Statement of the petitioner's company to establish the sufficiency of funds and capacity to pay the remaining consideration. The learned Trial Court handed over the Cheque to the *Ahlmad* (Officer of the Court) to keep the said cheque in his safe custody, but no order was passed for its encashment or retaining the amount in any profit bearing scheme till decision of the case. However, the learned High Court, after jotting down the entire controversy with regard to the order passed by the learned Trial Court, held that by failing to issue directions for depositing the cheque in a profit bearing account the learned Trial Court had committed a material illegality. The relevant paragraphs No.3 & 4 of the impugned order are reproduced as under:-

"3. Since the matter is pending determination before the learned Trial Court, therefore, this Court would not like to give any observation on merits of the case as the same may prejudice the rights and interests of both the parties. However, it must be borne in mind that in a Suit for specific performance of agreement to sell, a direction to deposit the balance sale consideration in Court is not to be addressed ceremonially as it

is aimed to assist the Court adjudicating the lis to evaluate the readiness and willingness of a Plaintiff to perform his part of agreement. The said readiness and willingness cannot be meant to be satisfied by simply submission of an instrument in the Court especially when the learned Trial Court through Order dated 05.07.2022 had conditionally granted an injunctive relief to the Respondent No.1 subject to immediate deposit of remaining sale consideration through a Cheque or Pay Order. It is also observed that the said order also stipulated a default clause as failure thereof was couched with penal consequences.

4. The direction passed by learned Trial Court in Order dated 05.07.2022 for depositing of balance sale consideration was obviously not aimed to '*gauge good gesture and endurance towards the compliance of the order*' as observed by learned Trial Court. Therefore, it is considered imperative at this stage that to strike a balance between the parties and to protect their respective rights and safeguard their interests, the learned Trial Court is directed to deposit the subject matter cheque submitted by Respondent No.1, in a profit bearing account, so that at the conclusion of trial, either of the parties may seek benefit of the amount deposited by the Respondent No.1".

6. It is a well-settled exposition of law that the relief of specific performance of a contract is discretionary, however the said discretion cannot be exercised arbitrarily or unreasonably but can be invoked to promote fairness and equity. The person seeking specific performance has to put on show that he is geared up and fervent to perform his part of the contract, but the other side is circumventing or evading the execution of his obligations arising out of the contract. While deciding the suit for specific performance of a contract, the Court has to consider and come to a decision regarding whether the plaintiff is ready and willing to perform his part of the contract, which is in fact substantiated by dint of the conduct or demeanor of the plaintiff before and after instituting the lawsuit. The equitable remedy rests on the discretion which is obviously exercised according to the well-established standards and philosophy of law and not whimsically or capriciously. The fundamental insightfulness of the Courts in directing the plaintiff in a suit for specific performance to deposit the sale consideration in Court in fact articulates that the vendee has the capacity to pay the sale consideration or balance sale consideration and is ready and willing to perform his obligations arising from the contract. An incessant readiness and willingness is a condition precedent for claiming relief of specific performance, which in unison also conveys the state of mind of the vendee, his capability to pay, keenness and commitment.

7. The word "pleadings" articulated under Order VI, Rule 1, CPC has much significance which not only includes the plaint but the written

statement as well. In every civil suit, the prime duty of the Courts is to look into the averments of the plaint which not only itemizes the factual aspect or bone of contention between the parties, but also highlights the cause of action with the ultimate relief for which the plaintiff has knocked on the doors of the law. According to Section 121, CPC, the Rules in the "First Schedule" have the same effect as if enacted in the body of this Code until annulled or altered in accordance with the provision of this Part-X. Appendix "A" of the First Schedule of the CPC highlights the specimen and modules of pleadings in which Form-47 relates to the "Suit for Specific Performance" wherein there is a specific condition jotted down in paragraph (3) that is to be incorporated in the plaint that *"The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice"*. It is unequivocally clear that the plaint instituted for specific performance of a contract should confirm the requirements prescribed in Form 47 of the CPC. Under the letter of the law, the plaintiff ought to communicate the essential particulars: that he approached the defendant for the performance of a contract/agreement which he failed and the plaintiff is still ready and willing to specifically perform his part of the obligation arising from the contract/agreement. The averments in the plaint with regard to readiness and willingness must be assimilated in the tenor which may corroborate the readiness and willingness of the plaintiff who is capable of living up to his obligations. The sanguinity of Section 24 of the Specific Relief Act 1877, "Personal bars to the relief" depicts certain conditions in which specific performance of a contract cannot be enforced in favour of a person and its clause (b) is directly related to a person *"who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed"*. However, in India the Specific Relief Act, 1877 was amended in the year 1963, and thereafter various sections were amended and renumbered. In its present form, Section 24 of the Specific Relief Act 1877 has been renumbered as Section 16 "Personal bars to relief" and its clause (c) has been amended as under:-

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.—For the purposes of clause (c),—

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

8. In the case of Messrs. Kuwait National Real Estate Company (Pvt.) Ltd. and others Vs Messrs. Educational Excellence Ltd. and another (2020 SCMR 171), this Court held that a party seeking specific performance of an agreement to sell is essentially required to deposit the sale consideration amount in Court. In fact, by making such deposit the plaintiff demonstrates its capability, readiness and willingness to perform its part of the contract, which is an essential pre-requisite to seek specific performance of a contract. Failure of a plaintiff to meet the said essential requirement disentitles him to the relief of specific performance, which undoubtedly is a discretionary relief. Likewise, in the case of Muhammad Jamil and others Vs Muhammad Arif (2021 SCMR 1108), this Court reiterated that the foremost requirement to seek specific performance for a vendee is to demonstrate his readiness and willingness to perform the agreement. The Promisor (vendor) need not perform his part of promise or obligation, unless the promisee (i.e. vendee) "is ready and willing to perform his reciprocal promise." In cases arising out of agreement to sell, a vendee, to demonstrate his readiness and willingness to perform his part of obligation, has to plead that he had offered to pay and was and is always prepared to pay the consideration. Whereas in the case of Hamood Mehmood Vs Mst. Shabana Ishaque and others (2017 SCMR 2022), this Court held that it is mandatory for the person, whether plaintiff or defendant, who seeks enforcement of the agreement under the Specific Relief Act 1877, that on first appearance before the Court or on the date of institution of the suit, it shall apply to the Court for getting permission to deposit the balance amount and any contumacious/omission in this regard would entail in dismissal of the suit or decretal of the suit, if it is filed by the other side. Whereas in the case of Muhammad Asif Awan Vs Dawood Khan and others (2021 SCMR 1270), while advertent to the dictum laid down in the case of Hamood Mehmood (supra) (reported as 2017 SCMR 2022), this Court observed that the Trial Court in the light of Hamood Mehmood case directed to deposit the

remaining consideration but did not provide any penal consequences, on the contrary the suit was fixed for the evidence of the plaintiff, therefore, in our opinion, the suit in the circumstances could not have been dismissed on account of non-deposit. The approach of the High Court that the non-compliance of the order directing the deposit would amount to failure on the part of the appellant to perform act necessary to the further progress of the suit and therefore, would result in dismissal of the suit under Order XVII, Rule 3, C.P.C. appears to be totally misconceived. In the case of Sukhwinder Singh Vs Jagroop Singh and Ors. (AIR 2020 SC 4865), the learned Court held that the suit being one for specific performance of the contract on payment of the balance sale consideration, the readiness and willingness was required to be proved by the Plaintiff and was to be considered by the Courts below as a basic requirement if a decree for specific performance is to be granted. In the case of Bhavyanath Vs. K.V. Balan (Dead) through L.Rs. (2020) 11 SCC 790, the learned Court held that law is certainly not that the purchaser in a suit for specific relief must prove that he was having cash with him from the date of the agreement till the relevant date but what is important is that he had the capacity to allow the deal to go through. Whereas in the case of P. Daivasigamani Vs. S. Sambandan (MANU/SC/1309/2022), it was held that readiness and willingness are not one, but two separate elements. Readiness means the capacity of the Plaintiff to perform the contract, which would include the financial position to pay the purchase price. Willingness refers to the intention of the Plaintiff as a purchaser to perform his part of the contract. Willingness is inferred by scrutinizing the conduct of the Plaintiff/purchaser, including attending circumstances. Continuous readiness and willingness on the part of the Plaintiff/purchaser from the date the balance sale consideration was payable in terms of the agreement to sell, till the decision of the suit, is a condition precedent for grant of relief of specific performance.

9. In a nutshell, the controversy in the present *lis* is germane to the controversy whether the learned Trial Court, after depositing the cheque, ought to have passed an order for its encashment, rather than handing it over to the officer of the Court for keeping it in his safe custody in order to avoid any possibility of misplacement or misappropriation; and whether the learned High Court has rightly

directed the learned Trial Court to deposit the said cheque in a profit bearing account so that at the conclusion of trial either of the parties may seek benefit of the amount. So far as the main case of specific performance is concerned, the learned Trial Court, keeping in view the divergent pleadings, will obviously decide the case on merits after recording the evidence of the parties and reach a conclusion regarding whether the decree of specific performance may be passed or not. However, the crucial point is whether merely depositing the Cheque in Court without its encashment is a valid tender of the balance sale consideration in a suit for specific performance and whether it amounts to exhibiting the good faith, readiness and willingness to complete the transaction in the terms of the agreement between the parties. The petitioner's plea is that the deposit of the Cheque in the Trial Court without its encashment is a valid tender and was upset by the directions of the learned High Court to deposit the same in some profitable scheme till the final adjudication of the law suit. In our view, there was no rhyme or reason, nor any commonsense explanation for retaining the Cheque in the shelf or vault for its cosmetic value without its encashment to gauge the readiness and willingness of buyer in the suit for specific performance. According to Section 6 of the Negotiable Instruments Act, 1881, a "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand. While Section 84 of the same Act deals with the consequences where a cheque is not presented for payment within a reasonable time of its issue and, under sub-section (2), it is provided that in determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. While handing over the cheque to the officer of the Court by the learned Trial Court, it was ignored that all cheques remain valid for certain time, thereafter it loses its efficacy/validity. When a cheque runs out its time it becomes unacceptable to the banker unless it is revalidated and confirmed by the drawer. According to the State Bank of Pakistan, Banking Glossary, (Ref: <https://www.sbp.org.pk/cpd/cpd-bank.asp>), "A stale cheque is a cheque that has been outstanding for an unreasonable time. A cheque may be outstanding for more than six months and a bank may under its discretion refuse to honor such a cheque. A bank is under no obligation to a customer to pay a cheque, other than a



certified cheque, after more than six months of its date, but it can charge its customer's account for a payment made thereafter in good faith". Whereas in the State Bank of Pakistan, Guidelines for Clearing Operations, the definition of "Stale Instrument" means the payment instrument that is presented with a date of issue that has exceeded six (6) months from the date of the payment instrument or as specified on it" Ref: <https://www.sbp.org.pk/psd/Guidelines-Clearing-Operations>).

10. The learned High Court rightly took judicial notice of the disparity and anomaly in the Trial Court's order for not investing the amount of cheque in some profit bearing scheme. In order to advance the cause of justice, the Court may take judicial notice of some relevant facts. The doctrine of judicial notice is an exception to the general rules of evidence including the taking of cognizance of certain known facts by the Court which may bring to its own aid for consideration. The mere submission of a cheque, even with the bank statement of a particular period, in Court without its encashment neither expressly means or denotes that the petitioner will surely maintain the equivalent balance in the bank account at all times, nor does it guarantee or represent that the cash flow of the equivalent amount will be maintained and reserved for payment if the suit is finally decreed by the learned Trial Court. Even otherwise, if the cheque is not presented for encashment and only retained in the custody of the Court's officer, it will become stale after six months, and thereafter nothing will remain in Court to decipher the readiness and willingness of the buyer with good faith to perform his part of the contractual obligation. As an aftermath, the Court has to go back to square one or start from scratch. Even if the stale cheque is revalidated and retained in the possession of Court, nothing will remain in a tangible form to ensure or prove the financial position with readiness and willingness. The expression specific relief means a remedy which precisely aims for the accomplishment of an obligation. The suit for specific performance is brought to ensure the performance of a contract by a person who is in default, but in tandem, it is also a corresponding obligation upon the person who is seeking enforcement or performance to put on view that he is by all means willing to perform his obligations sincerely and is not in default. It is a well recognized perception and tenet of law that the specific relief is meant for performance of a commitment which

becomes remedial when the Court commands the specific performance and turns out to be protective when the Court grants an injunctive order to secure the rights of the parties pending adjudication. It is coherently deducible from the law laid down by this Court beyond any shadow of doubt that in the suit for specific performance of a contract to sell, the deposit of sale consideration in the Court may be ordered by the Court. In fact the deposit of the amount in Court, besides showing readiness and willingness, will also put on view the good faith and *bona fide* intention, subject to the final outcome of the suit on merits, that the vendee was not incapable of performing his part of the contract, at least in terms payment of sale consideration as per the covenant, if not violative of any other essential term of the contract which may debar the relief in terms of Section 24 of the Specific Relief Act 1877 which aspect can only be thrashed out after leading evidence by the parties. We are also sanguine that the deposit of the sale consideration or balance consideration in the Court is not an automatic requirement but there must be an order of the Court for deposit. While passing the order for deposit of sale consideration or balance sale consideration by the Trial Court, some reasonable time to deposit the money in Court should also be afforded for compliance of the order along with the consequences of non-compliance of the order with clarity in advance.

11. In the wake of the above discussion, we do not find any illegality or perversity in the impugned order passed by the learned High Court, and therefore we are not inclined to grant leave to appeal. The Civil Petition is dismissed accordingly.

Judge

Judge

Judge

Islamabad the  
8<sup>th</sup> December, 2022  
Khalid.  
Approved for reporting.