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Judgment Sheet
IN THE PESHAWAR HIGH COURT,
PESHAWAR.
JUDICIAL DEPARTMENT.

JUDGMENT

Civil Revision No.765-P/2022

Date of hearing 02.08.2024.

Haji Idrees

Versus

Haji Nawab Khan Afridi etc

**Petitioner (s) by: Mr. Farman Ullah Khan
Advocate.**

**Respondent(s) by: M/s Fida Gul and Mian Afrasiab
Gul Kakakhel Advocates.**

WIQAR AHMAD, J:-. Through instant civil revision filed under Section 115 CPC, petitioner has challenged impugned order dated 09.06.2022, passed by learned Additional District Judge-I, Khyber, whereby appeal filed by respondent against order dated 23.10.2021 of learned Civil Judge-II, Khyber was allowed.

2. As per contents of instant petition, respondent No.1/plaintiff filed a civil suit against petitioner and respondent No.2, for specific performance of an agreement to sell dated 02.03.1999, alongwith declaration. An application

for grant of temporary injunction was also filed alongwith the suit. The suit was contested by petitioner (defendant) and respondent No.2 through filing their respective written statements and replies to the application for grant of temporary injunction. Petitioner also filed application for rejection of plaint under Order VII Rule 11 CPC, which was contested by respondent No.1 through filing reply. Learned civil Court, after hearing parties, on allowing application of petitioner under Order VII Rule 11 CPC, rejected plaint of respondent vide impugned order dated 23.10.2021. Respondent No.1 feeling aggrieved from said order, filed appeal, which was allowed by learned appellate Court vide judgment dated 09.06.2022. Aggrieved from impugned judgment of the appellate court, petitioner has filed instant civil revision.

3. Arguments heard and available record perused.

4. Perusal of plaint reveals that same had been filed mainly for specific performance of an agreement to sell dated 02.03.1999 entered in respect of sale of 8 kanals property with defendant

No.1 for a consideration of Rs.600,000/- (six lac) whereunder Rs.40,000/- had been paid in advance. The agreement to sell was also revealing that possession had not been transferred and same was to be transferred lateron. A specific date of 02.09.1999 had been mentioned in the agreement to sell for payment of remaining sale consideration. The first attempt for specific performance of agreement through official channel had been made by petitioner on 06.11.2017, where petitioner had filed an application before the then Assistant Political Agent (hereinafter referred to as APA) under the repealed Frontier Crimes Regulation (hereinafter referred to FCR). It is also apparent that a jirga (council of elders) had been constituted by the APA on 10.05.2018. Award of Jirga was rendered whereafter the APA had passed a decree on 13.09.2018 in favour of respondent. An appeal had also been filed under repealed FCR but same had been transferred to learned Additional District Judge and then allowed partially, resulting into remand of the matter to the civil Court. The matter then got reopened before the civil Court where an amended plaint was

submitted. The question before two Courts below was, whether plaint was liable to rejection under Order VII Rule 11 CPC? Both the Courts have taken varying stances on the issue. Learned civil Court rejected the plaint under Order VII Rule 11 CPC while learned appellate Court has reversed the order.

5. The agreement to sell whereupon the suit was brought had been executed almost 1 ½ decade before filing of first proceedings for its enforcement. Perusal of contents of deed also reveals that a specific date had been given for payment of remaining sale consideration and it can easily be concluded therefrom that time was of essence of the contract. As stated earlier possession had not been handed over at the time of the agreement. Petitioner had never made any attempt for tendering remaining sale consideration within the provided time. This is evident from contents of plaint itself. Petitioner had delayed payment of remaining sale consideration and the fact remains that same has never been paid till date nor it has been deposited at any forum. Petitioner has annexed an application with their CM No.1203-P/2024 for

additional documents at page No.24 showing that they had filed an application before civil Court on 25.11.2020 for allowing them to deposit remaining sale consideration but the amount could not be deposited in the civil Court. Although learned counsel for respondent No.1 claimed that civil Court had not allowed deposit of the amount but there is no order of civil Court denying such permission. Even if the civil Court had denied same, they could have filed the application before learned appellate Court to deposit remaining sale consideration but remaining sale consideration has neither been deposited before appellate Court nor before this Court in instant civil revision. The fact remains that remaining sale consideration has never been tendered to the owner i.e, petitioner nor has same been deposited in any account of the Court. An attempt has been made in the plaint for creating justification for non-tendering the remaining sale consideration by mentioning that another person (i.e. respondent No.2 namely Waris Khan) was having claim over property in dispute therefore, petitioner had not been depositing the remaining sale

consideration. In a suit for specific performance where bonafide of the parties, particularly, parties seeking the enforcement, plays a vital role. A delay of almost 18 years in tendering remaining part of sale consideration can hardly be ignored when the contract had specified a date before which payment was to be made. If a dispute was existing on the property, same dispute has also been existing at the moment but this plea of plaintiff, would hardly give justification for withholding payment of remaining sale consideration for 18 years. Similarly non deposit of amount in civil Court at the first available chance and then non deposit of same till date in account of appellate Court or this Court was itself compounding problems of the respondent and also making of the exercise of discretion (for specific enforcement of the agreement) very difficult in his favour. Hon'ble Supreme Court of Pakistan while giving its judgment in case of "**Muhammad Aslam and others Vs Muhammad Anwar**" reported as 2023 SCMR 1371 has held regarding nonpayment of remaining sale consideration and its effect on a suit for specific performance that in the case time

was of the essence of the contract and when remaining sale consideration could not be arranged by the vendee then he was absolutely not entitled for discretionary relief in the shape of a decree for specific performance. It is also inter alia held that a party cannot be allowed to plea a case beyond pleadings. Facts of the case in instant matter is considered from contents of plaint and documents annexed therewith particularly agreement to sell and when so considered, this Court comes to the conclusion that respondent No.1 had not been able to demonstrate his bonafide in performance of his part in the agreement to sell and description of his endeavors to make payment of remaining sale consideration was missing in the plaint. The justification presented in the plaint for non paying the remaining sale consideration was not at all found reasonable on its face therefore further progress in the suit would be a futile exercise. Similarly non deposit of remaining sale consideration in the Court at the first available opportunity and causing of delay thereof was also fatal for the case. In this respect reliance may be placed on the judgment of

Hon'ble Supreme Court of Pakistan rendered in case of **“Hamood Mehmood Versus Mst. ShabanaIshaque and others”** reported as **2017 SCMR 2022.**

6. So far as plea of limitation is concerned, in said respect observation of learned appellate Court was right that Limitation Act 1908 had not been applicable in FATA before merger of erstwhile FATA in the province of Khyber Pakhtunkhwa. Said issue has also been similarly resolved by this court while rendering it's judgment in the case bearing title Faqir Hussain and another Vs. Khan Sher C.R.No.283-P/2024. The suit was however not maintainable for other reasons mentioned above and for said reasons, the plaint of plaintiff is rejected under Order VII Rule 11 CPC on allowing instant civil revision and order of learned appellate Court dated 09.06.2022 (impugned herein) is set aside.

JUDGE

*Date of hearing & announcement
of judgment*.....02.08.2024.

*Date of preparation and
signing of judgment* 05.08.2024.

“A.Qayum PS” (SB)

Hon'ble Mr. Justice Wiqar Ahmad.

CR No. 765-P/2022.