

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No. 36908 of 2023

Azhar Javaid

versus

Malik Mushtaq Noor

JUDGMENT

<i>Date of hearing</i>	16.10.2023
<i>Petitioner by</i>	<i>Mr. Shahid Mehmood Khan Khilji, learned Advocate</i>
<i>Respondent by</i>	<i>Malik Muhammad Imran Joiya, learned Advocate.</i>

SULTAN TANVIR AHMAD, J:—The present civil revision, filed under section 115 of the Code of Civil Procedure, 1908 (the ‘*Code*’), is directed against judgment and decree dated 28.04.2023 passed by the learned Additional District Judge, Sargodha as well as judgment and decree dated 18.03.2022 passed by the learned Civil Judge, Sargodha.

2. Brief facts of the case are that the revision-petitioner instituted suit dated 19.11.2015 (the ‘*suit*’) for specific performance of agreement to sell dated 13.08.2015 (the ‘*agreement*’), with respect to the property measuring about 6 marla and 90 square feet, as further detailed in the plaint (the ‘*suit property*’). *Per* contents of the *suit*, the revision-petitioner agreed to purchase the *suit property* through the *agreement* for consideration of Rs. 65,00,000/-, out of which Rs. 27,00,000/- was paid as earnest money but the respondent failed to perform his part of obligations by

receiving the remaining consideration and passing on the title of the *suit property* to the revision-petitioner. The respondent instituted suit for partition on 08.07.2017 against Mukhtar Ilahi, Iftikhar Ilahi, Nisar Ilahi (sons of Muhammad Ilahi) and Mst. Kalsoom Azhar, Mst. Shaheen Mazhar (daughters of Muhammad Ilahi). The said suits were contested by the relevant parties and the following consolidated issues were framed:-

1. *Whether the plaintiff entered into an agreement to sell regarding the suit property with the defendant on 13.08.2015 against consideration amount of Rs.38,00,000/-? OPP*
2. *Whether the plaintiff is entitled to get the decree as prayed for? OPP*
3. *Whether the plaintiff has no cause of action to file this suit? OPD*
4. *Whether the plaintiff has filed this suit just to harass and pressurize the defendant and suit of the plaintiff is liable to be dismissed? OPD*
5. *Whether the plaintiff remained fail to pay remaining consideration amount within stipulated period? OPD*
6. *Whether suit of defendant for partition is liable to be decreed? OPD*
7. *Relief.*

Learned trial Court gave issues-wise findings. The *suit* filed by the revision-petitioner was dismissed and suit for partition filed by the respondent was decreed vide judgment and decree dated 15.03.2022 and the respondent was directed to return the earnest money of Rs.27,00,000/- to the revision-petitioner. Being dissatisfied from the above judgment and decree, appeal No. 146 of 2022 was filed by the revision-petitioner, which was dismissed by the learned Appellate Court vide judgment and decree dated 28.04.2023. Aggrieved from the same the present civil revision has been instituted.

3. Mr. Shahid Mehmood Khan Khilji, learned counsel for the revision-petitioner has pressed this revision-petition on the ground that time is not essence in the

agreement. Learned counsel for the revision-petitioner has contended that in the cases of immoveable properties mere mentioning of the date in an agreement is not sufficient to construe the intention that the time is of essence. He relied on the case titled “*Mrs. Zakia Hussain and another Versus Syed Farooq Hussain*” (**PLD 2020 SC 401**). Learned counsel for the revision-petitioner has claimed that his case attracts second part of section 55 of the Contract Act, 1872 (the ‘*Act*’). Learned counsel for the revision-petitioner has added that the respondent rented out the *suit property*, thus, incapacitated himself to perform the *agreement*, as he was not in the position to give vacant possession.

4. Malik Muhammad Imran Joiya, learned counsel for the respondent has disputed the above grounds by stating that the closing date is provided in the *agreement*, which is followed by clause of confiscation of earnest money upon failure to pay remaining consideration within the stipulated time, therefore, time is an essential clause of the *agreement*. He submitted that stance of alleged failure of the respondent to keep vacant possession by renting out the *suit property* or incapacity of the respondent to perform the *agreement*, is an afterthought and beyond the pleadings.

5. A reading of the *agreement* reveals that the parties specifically agreed that the remaining payment of Rs. 3,800,000/- (thirty eight hundred thousand rupees) was required to be made by 13.11.2015. This is followed by a stipulation that upon failure of the same, the earnest money of Rs. 2,700,000/- (twenty seven hundred thousand rupees) shall be forfeited. There is nothing in the *agreement* that suggests that when entering into the *agreement* real intention of the parties was that time should not be an essential clause so that the revision-petitioner can get support from second part of

section 55 of the *Act*. The intention of the parties to ensure the performance of obligations within the given time is further evident from the following answer of the revision-petitioner in his cross-examination:-

"---یہ درست ہے کہ معہدہ Ex-P1 مابین فریقین کی کٹ ڈیٹ (cut date) بر تکمیل معہدہ کی حقیقتی تاریخ 13.11.2015 تھی۔ یہ بھی درست ہے کہ موجودہ 13.11.2015 کو میں موجود نہ تھا۔"

The unmistakable language of the *agreement* and close reading of evidence leave no doubt that the time, as postulated was of essence.

6. In case titled "Muhammad Abdur Rehman Qureshi Versus Sagheer Ahmad" (**2017 SCMR 1696**), the Supreme Court of Pakistan has observed that in view of rapid increase in prices of immovable properties, seller cannot be left at the mercy of the buyer to bind him and then delay in completion of contract hiding behind an archaic legal principle that in contracts involving immovable properties, time is generally not of the essence. It is ruled that:-

"...This rule was settled many centuries ago when prices of real estate remained constant and stagnant for years on end. It is high time that this rule was revisited and revised keeping in view the changed circumstances and the ground realities of the real estate market. In this day and age, on account of rapid increase in population demand for real estate has increased...."

(Underlining is added)

7. While relying on above judgment, in case titled "Ms. Sara Bibi Versus Muhammad Saleem and Others" (**PLD 2021 Islamabad 236**), the Court observed as follows:-

"... Gone are the days when, with respect to agreements for the sale of immovable properties, time was generally held not to be of the essence. In the case of Muhammad Abdur Rehman Qureshi

v. Sagheer Ahmed (2017 SCMR 1696), even though time was held not to be of the essence for the performance of an agreement to sell an immovable property, the Hon'ble Supreme Court, set-aside the concurrent judgments decreeing the suit for specific performance of such an agreement. The inequitable conduct of the institution of the suit for specific performance with an inordinate delay during which time the value of the suit property had substantially increased furnished the ground for setting-aside the decree for specific performance."

(Emphasis supplied)

8. In the present case though the *suit* was filed soon after the final date settled by the parties for payment of remaining consideration but the revision-petitioner instead of depositing the remaining consideration at the time of filing of the *suit*, admittedly caused frustrating delay of about three and half years of institution of the *suit* for deposit of remaining consideration or in making such request to the learned trial Court. The revision-petitioner, in this regard, made the following admission: -

"---یہ درست ہے کہ میں نے داڑی دعویٰ ساڑھے تین سال بعد بقیہ رقم زبرٹن جمع کرنے کی درخواست گزاری ---"

The revision-petitioner has even failed to demonstrate his willingness and / or capacity to perform the *agreement* as per the agreed terms, by failure to deposit remaining consideration or by making the request to the learned Court for three and half years of institution of the *suit*.

9. Thereafter, the revision-petitioner clearly developed his case and adopted the stance that some tenants were having possession of the *suit property* and the respondent breached the condition of handing over vacant possession of the *suit property*. This was never the case of the revision-petitioner when the *suit* was instituted. In the entire plaint no such fact is pleaded. The revision-petitioner was mindful of

this during his examination, who deposed as under:-

"---یہ درست ہے کہ کرایہ دار بیٹھے ہیں تین ماہ بعد ادا یگی والی کوئی بات میرے عرضی دعویٰ میں تحریر نہ ہے۔ یہ یاد نہ ہے کہ مجھے مدعالیہ نے انکار کیا تو میں نے دعویٰ دائز کیا تھا۔"

10. Order VI Rule 2 of the *Code* requires that the pleadings should contain a statement, in a concise form, of the material facts, on which the concerned party relies for his claim or defence. The allegations of failure of condition by not retaining possession or renting out the *suit property* form *facta probanda*. It was material fact and required to be pleaded and then to be proved through evidence. Such material fact when not pleaded, cannot be deposed in the evidence. Neither the evidence in departure of pleading of those material fact(s) can be given any weight. Reference can be made to the case titled "*Muhammad Aslam and others Versus Muhammad Anwar*" (**2023 SCMR 1371**).

11. The findings of the learned two Courts below are found to be based on correct appreciation of evidence and law applicable thereupon. This petition is, therefore, **dismissed**. No order as to costs.

(**Sultan Tanvir Ahmad**)
Judge

Announced in open Court on _____ .

Approved for Reporting

Judge