

JUDGMENT SHEET
IN THE LAHORE HIGH COURT,
RAWALPINDI BENCH, RAWALPINDI
JUDICIAL DEPARTMENT

Regular First Appeal No.08 of 2018

Ejaz Hussain Rathore **V/S** *Bahria Town (Private) Limited,
Ahmad Ali Riaz and Riaz Malik*

JUDGMENT

Date of hearing	18.10.2023
Appellant(s) by	Syed Ashfaq Hussain Naqvi, ASC
Respondent(s) by	Mr. Qaiser Qadeer Qureshi, ASC.

JAWAD HASSAN, J. This regular first appeal under Order XLI Rule 1 read with Section 96 of the Code of Civil Procedure (V of 1908) (hereinafter referred as “***CPC***”) calls in question the judgment and decree dated 16.10.2017, whereby the Civil Judge Class-I, Rawalpindi proceeded to partially decree the suit instituted by the Appellant whilst dismissing same to the extent of prayer of possession of suit property.

2. The facts out of which this appeal has arisen are stated in brief that the Appellant purchased two plots bearing 05-marlas in Premier Awami Villas in response to offer made by the Respondent on 06.04.2006, in furtherance whereof, an amount of Rs.49,900/- as down payment alongwith membership fee of Rs.9000/- was paid by the Appellant. The total cost of each plot was fixed as Rs.4,99,999/-, which was payable in ten quarterly installments of Rs.44,910/-. After balloting, the Appellant was allotted two plots bearing Nos.AWR-02977 and AWR-02984 and he was directed to deposit installments as per schedule and last payment was made on 15.10.2008. Despite delivery of possession of aforesaid plots, the

Defendants carried out two successive balloting on 09.01.2010 and 30.06.2011 and allotted Villa No.463 location AV-III, Size 05-Marlas Premier Awami Street No.26 against Registration No.AWR-02984 and Villa No.607b, Sector III, Second Floor, Street No.29 with 795 Sq.feet covered area against Registration No. AWR-02977. Due to violation of terms and conditions and demand of Rs.1,50,000/- against each plot, the Appellant filed suit for possession, permanent injunction and recovery of Rs.524,017,300/-. The said suit was partially decreed vide judgment dated 07.09.2015. This judgment and decree was challenged by the parties through separate appeals bearing Nos.158 of 2015 and 136 of 2015, which were decided through single judgment dated 23.02.2016 and case was remanded with direction to trial Court to frame appropriate issues and to decide it, in accordance with law. Feeling dissatisfied, the Appellant challenged aforesaid remand order through Civil Petition No.1621 of 2016 before the Supreme Court of Pakistan, however; it was disposed of with direction to the trial Court to decide the case on merits without being influenced from tentative observation made in the aforementioned remand order, pursuant to which the impugned judgment and decree was passed. Hence this appeal.

3. Learned counsel for the Appellant, when confronted, on what grounds the Appellant has challenged the impugned judgment and decree which otherwise has been passed keeping in view all aspects of the matter, in response whereto, he stated that he does not press this appeal to the extent of possession of subject property and alternate plot, however, he presses hard with regard to claim of special damages.

4. Learned counsel for the Appellant *inter alia* contends that the trial Court has not taken into consideration documents produced before it as Ex.P33 to Ex.P38; that the Appellant explained the causes of special damages due to breach of terms and conditions of

agreement (Ex-P2) but the trial Court has decided this issue in a slipshod manner.

5. Contrary, learned counsel for the Respondents has argued that the learned trial Court after analyzing the evidence available on file has comprehensively dealt with the issue and passed an eminent judgment which does not call for interference by this Bench.

6. We have heard the arguments and perused the record.

7. Pursuant to directions passed in R.F.A.No.158 of 2015 dated 23.02.2016, the trial Court captured the disputed area of facts by framing the following issues:-

1. *Whether the plaintiff is entitled to get a decree for possession regarding house measuring 5-marlas Awami Premier Villa No.463, Location AV-III, allotted to plaintiff through balloting on 09.01.2010 against registration No.AWR-02984 and house measuring 5-marlas Awami Premier Villa, allotted through balloting on 30.06.2008 vide registration No.AWR-02977? OPP*
2. *Whether the plaintiff is also entitled to get a decree for recovery of amount Rs.524,017,330/? OPP.*
3. *Whether the plaintiff is entitled to get a decree for permanent and mandatory injunction regarding the suit property mentioned in the plaint? OPP.*
4. *Whether plaintiff has no cause of action and locus standi to file the instant suit and his suit is liable to be rejected u/o 7 rule 11 C.P.C.? OPD*
5. *Whether suit of the plaintiff is false, frivolous and vexatious and has not come to the court with clean hands? OPD*
6. *Whether plaintiff is estopped by his words and conduct? OPD*
7. *Whether pre-fabricated project was revised at the request of member as pre-fabricated villas were not good as the concrete houses? OPD*
8. *Whether suit of the plaintiff is not maintainable in its present form? OPD*
9. *Whether in case of dismissal of instant suit, defendants are entitled to get special cost u/s 35-A C.P.C? OPD*
10. *Relief.*

After recording evidence of the parties, the trial Court granted relief to the following effect:

“In the light of my findings on each issue above, the suit of the plaintiff for possession of Premier Awami Villas is not maintainable in its present form, therefore, to that extent suit of the plaintiff is dismissed. However, as per offer of the defendants plaintiff is at liberty to take the possession of Villas being offered by the defendants in Phase-VIII of Bahria Town by paying additional charges Rs.300,000/- or in alternative is entitled to recover Rs.1,116,000/- alongwith profit according to Defense Saving Certificate from 16.10.2008 till the payment of above said amount alongwith simple nominal damages Rs.400,000/- with profit according to Defense Saving Certificate from date of decision upto date of payment”.

8. Before proceeding further, it would be advantageous to mention the details of damages allegedly suffered by the Appellant which were provided in the plaint to the following effect:

Total amount of money paid to the defendants	Rs.1,116,000/-
Loss of Profit on the above money @ Rs.14% per annum)	Rs.540,330/-
Cost of loss of opportunity due to above investment	Rs.1,116,000/-
Compensation for the Loss of Mense Profit due to failure to deliver the possession of the villas	Rs.1,245,000/-
Compensation for torture and agony faced by the plaintiff due to non-performance of the defendants.	Rs.20,000,000/-
Damages for failure to perform by the defendants as per their representations and projections	Rs.500,000,000/-
Total	Rs.524,017,330/-

9. With regard to award of damages, the guidance is sought from the judgment of Supreme Court of Pakistan cited in “ABDUL MAJEED KHAN versus TAWSEEN ABDUL HALEEM and others” (2012 PLC (C.S.) 574) wherein the general damages and special damages have been elaborated in details by holding as under:

“Term 'general damages' refers to special character, condition or circumstances which accrue from immediate, direct and approximate result of wrong complained of. Similarly, term 'special damages' is defined as actual but not necessary result of injury complained of. Special damages follow as a natural and approximate consequence in a particular case by reason of special circumstances or condition. In an action for personal injuries, general damages are governed by the rule of thumb whereas special damages are required to be specifically pleaded and proved”.

10. We have asked the learned counsel for the Appellant to show from the evidence that the Appellant has suffered any loss of profit @Rs.14% per annum, compensation for the loss of mense profit due to failure to deliver possession of the villas, and likewise to further show from the record as to compensation for torture and agony and damages for failure of the Respondents, learned counsel was unable demonstrate from the record that the Appellant has adduced any evidence to prove special damages allegedly sustained on account of above mentioned losses. Reliance is also placed on “Malik GUL MUHAMMAD AWAN versus FEDERATION OF PAKISTAN through Secretary M/o Finance and others” (2013 SCMR 507) wherein it has been held that *“person claiming special had to prove each item of loss with reference to the evidence brought on record”*. It is also held in case “Mrs. Alia Tareen, Managing Director, Pakistan General Hospital, Quetta and others Vs. Amanullah Khan, Advocate and 3 others” (PLD 2005 Supreme Court 99) that *“special damages must be specially pleaded and proved.”* While awarding special damages, it is to be kept in mind that the person claiming special damages has to prove each item of loss with reference to the evidence brought on record. This may also include out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation as held by the Supreme Court of Pakistan in “MUNAWAR AHMED, CHIEF EDITOR DAILY SAMA

and another versus MUHAMMAD ASHRAF and others” (PLD 2021 Supreme Court 564). Perusal of evidence produced by the appellant reveals that the Appellant has not brought on record any tangible material entitling him for special damages as claimed for. A ground has been agitated by learned counsel for the Appellant that documents Ex.P33 to Ex.P38 have not been considered. Needless to add that these documents relate to acknowledgment slips for different tax years which have no nexus to the grant of special damages. The Appellant’s claim does not qualify aspired destination even if same is tested and evaluated on touchstone of parameters envisaged in Section 73 of the Contract Act, 1872. In said regard, it shall be appropriate for ready reference to first reproduce said provision of law as follow:

“Section 73:

When a contract has been broken, the party who suffers by such breach is entitled for receive, from the party who has broken the contract compensation for any loss or damage caused to him there by, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.”

11. Appellant’s claim so agitated in the case in hand was bound to be followed by strong and legally reckoned evidence for proof thereof and mere breach of the agreement on part of the Respondent in said regard was not sufficient enough to straightaway grant special damages in favour of the Appellant. In this connection, the Appellant was obliged to establish, substantiate and prove all heads of his claim separately and distinctly. Reliance in said regard may be placed upon observation in case “MALIK MUHAMMAD RIAZ versus MUHAMMAD HANIF and others” (2022 SCMR 1572) whereby it has been held that:

“6.... The survey of Prayer Clauses as incorporated in the plaint for the relief of damages, it is somewhat mix of special and general damages claim but no convincing evidence was adduced to the effect of sustaining any serious financial losses even no evidence was adduced with regard to the alleged irreparable losses or mental agony.”

12. According to substance of aforementioned Section 73 of the Contract Act, 1872, remote and indirect loss or damage sustained by reason of agitated breach cannot be granted. Reliance in said regard maybe placed upon pronouncement in case “SANDOZ LIMITED and another versus FEDERATION OF PAKISTAN and others” (1995 SCMR 1431) relevant part wherein reads as follows:

“27. A perusal of the above-quoted section 73 shows that it deals with the consequences of breach of a contract and the basis on which compensation for any loss or damage is to be assessed by providing that when a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such, breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. It further provides that such compensation was not to be given for any remote and indirect loss or damage sustained by reason of such breach. ...”.

13. Furthermore, it has been held in “MIRZA MUHAMMAD MOIN BAIG Versus Mst. AMTUL RAUF and others” (2007 MLD 1978) that *“There is no yardstick or definite principle for assessing damages. Party claiming damages due to breach of contract must establish contract and extent of damages. Section 73 of the Contract Act, pertains to the compensation for loss or damage caused by breach of contract, which cannot be given for any remote and indirect loss or damage sustained by reason of the breach.”* It has also been held in case “M/s. SAGARIA BROTHERS versus Messrs AZIM MARKAZ and 2 others” (PLD 1994 Karachi 149) that *“it is a*

settled principle that in order to be entitled to compensation for breach of contract, the party claiming compensation must establish specifically the loss suffered by it, a mere general assertion cannot be made basis for awarding compensation.” However, in the case in hand, the Appellant has not embraced success on any count in proving the actual damages he suffered and all heads of the damages he claimed for to enable court for assessment and grant thereof.

14. We are thus of the considered view that the trial Court in the circumstances rightly decreed the suit of Appellant partly. The Appellant has failed to persuade us to exercise appellate jurisdiction. As a result, this Appeal, being devoid of any merit, is hereby **dismissed** with no orders as to cost.

(MIRZA VIQAS RAUF)
JUDGE

(JAWAD HASSAN)
JUDGE