Stereo.HCJDA 38.

**Judgment Sheet**
**IN THE LAHORE HIGH COURT,**
**BAHAWALPUR BENCH, BAHAWALPUR**

**JUDICIAL DEPARTMENT**

....

**Civil Revision No.618-D of 2009/BWP.**

Ishtiaq Saleem

**Versus**

Syed Zulfiqar Ali Shah (deceased) through L.Rs & others

***J U D G M E N T.***

Date of hearing: 11.04.2023.

Petitioner by: Mr. Nadeem Iqbal Chaudhary, Advocate.

Respondents by: Ch. Arshad Ali, Advocate.

**AHMAD NADEEM ARSHAD, J.** This civil revision is directed against the judgment and decree of learned appellate court dated 21.02.2009 whereby while accepting the appeal of respondents decreed their suit for specific performance of an agreement to sell.

2. Briefly, the facts, forming factual canvass of this revision are that plaintiffs/respondents (hereinafter referred to as "***respondents***") instituted a suit for specific performance on 06.01.2003 against the defendant/petitioner (hereinafter referred to as "***petitioner***") by maintaining that petitioner agreed to sell his land measuring 09-kanals bearing Khata No.6, rectangle No.306/3, killa No.25 measuring 06-kanals 11-marlas and rectangle No.306/4, killa No.5 measuring 02-kanals 09-marlas, situated at Chak No.19-A Tehsil Liaqat Pur District Rahim Yar Khan (hereinafter referred to as "***suit property***"), for a consideration of

Rs.3,50,000/- and after receipt of Rs.100,000/- executed an agreement to sell dated 13.06.2002; that respondents remained ready to perform their part but the petitioner failed to abide by his commitment which constrained them to institute the suit. The petitioner resisted their suit through filing contested written statement on 13.06.2003 by raising preliminary objections that respondents have no cause of action; that petitioner transferred the suit property through mutation No.476 dated 04.01.2003 to Abrar Murtaza etc.; that agreement to sell dated 13.06.2003 was cancelled due to non-performance of the conditions as respondents failed to pay the remaining consideration amount within stipulated time and became defaulter; that the petitioner issued a written notice on 18.09.2002 to the respondents to pay remaining consideration amount within two days otherwise sale bargain will be deemed to be cancelled but neither the respondents replied to the said notice nor paid remaining consideration amount, therefore, agreement has been cancelled. While replying on facts admitted the execution of agreement to sell, however reiterated the same stance pleaded in the preliminary objections. After submission of written statement petitioner absented from the court proceedings, therefore, ex-parte proceedings were initiated against him on 11.11.2004. Respondents were asked to produce their ex-parte evidence. Learned trial court after recording ex-parte evidence of the respondents dismissed their suit vide judgment and decree dated 19.10.2007 on the grounds that they failed to establish on record that they remained ready to perform agreement to sell in letter and spirit and that inspite of the fact petitioner alienated the suit property to Abrar Murtaza etc. through

mutation No.576 dated 04.01.2003, they did not make them party. Feeling aggrieved, respondents preferred an appeal. Petitioner appeared before the learned appellate court but again absented himself from the court proceedings, therefore, ex-parte proceedings were initiated against him and the learned appellate court after providing opportunity of hearing to the respondents accepted their appeal, set aside the judgment and decree of learned trial court and decreed their suit vide impugned judgment and decree dated 21.02.2009. Being dis-satisfied, petitioner approached this Court through the instant revision petition.

3. Learned counsel for the petitioner submits that while decreeing the suit, the learned appellate Court did not consider that respondents failed to pay the remaining consideration amount within due time as per agreement and they failed to abide by their commitment as per agreement to sell, therefore, they were not entitled for the decree of specific performance which otherwise being discretionary relief could not be claimed by anybody as a right. Further adds that in the legal notice the petitioner asked the respondents to deposit/pay the balance amount of consideration within two days but they failed to do so which fact on the one hand speaks volumes about the *bona fide* of the petitioner towards completion of the contract and on the other hand proof of inaction on the part of the respondents towards payment of the balance amount. Argues that according to the latest view of the superior courts, the intent of the vendees to complete the agreement between the parties is discernable from their readiness to deposit the balance amount with the Court at the time of filing of suit for specific performance but the respondents did not

do so until and unless they were compelled by the Court in that regard. Contends that at the most the respondents were entitled for return of the paid amount but by no stretch of imagination they were entitled for a decree of specific performance. In support of his contentions, learned counsel for the petitioner has relied upon the cases reported as "*HAMOOD MEHMOOD versus Mst. SHABANA ISHAQUE and others*" (**2017 SCMR 2022**), "*SALMA Bibi and others versus Rana SAGHEER HUSSAIN*" (**PLD 2022 Lahore 589**), "*MANZOOR HUSSAIN versus Haji KHUSHI MUHAMMAD*" (**2017 CLC 70**), "*LIAQAT ALI Khan and others versus FALAK SHER and others*" (**PLD 2014 Supreme Court 506**), "*Haji ABDUL KARIM and others versus Messrs FLORIDA BUILDERS (PVT) LIMITED*" (**PLD 2012 Supreme Court 247**), "*BOARD OF GOVERNORS, AREA STUDY CENTRE FOR AFRICA AND NORTH AMERICA, QUAID-E-AZAM, UNIVERSITY, ISLAMABAD and another versus Ms. FARAH ZAHRA*" (**PLD 2005 Supreme Court 153**), "*HAFEEZ Ahmad and others versus CIVIL JUDGE, LAHORE and others*" (**PLD 2012 Supreme Court 400**), "*NASIR ALI versus UMAR DRAZ and others*" (**PLD 2011 Lahore 599**), "*ILAM DIN versus HASSAN DIN and others*" (**PLD 2006 Lahore 121**), "*HYDERABAD DEVELOPMENT AUTHORITY through M.D. Civic Centre, Hyderabad versus ABDUL MAJEED and others*" (**PLD 2002 Supreme Court 84**), "*Miss KIRAN ARIF MIAN versus Miss KINZA KHALID and another*" (**PLD 2008 Islamabad 11**), "*REHMATULLAH and others versus SALEH Khan and others*" (**2007 SCMR 729**), "*ABDUL GHANI versus Mst. SHAHEEN and others*" (**2007 SCMR 834**) and "*MUNIR Ahmad and 7 others versus BASHIR Ahmad ANJUM and 2 others*" (**PLJ 2007 Lahore 1109**).

4. Conversely, learned counsel appearing on behalf of respondents, while defending the impugned judgment and decree, argues that since the cut-off date for final payment was 31.10.2002, the statements of PWs got recorded by his clients show that they were remained ready for payment of outstanding consideration amount, thus, the assertion of the learned counsel for the petitioner cannot be given any weightage; that in a suit for specific performance instead of deposit of cash in the court, the capacity of the vendees has to be judged by the Court and when P.W-4 Zulfiqar Ali one of the respondents while recording his statement categorically stated that they are ready to pay remaining consideration amount of Rs.2,50,000/-, no illegality was committed by the learned appellate Court while decreeing the suit; that *bona fide* and readiness of the respondents to perform their part of the contract in the shape of payment of balance amount is also evinced from their evidence; that they were ever ready to pay the balance consideration amount; that since the respondents deposited the balance amount before the Court, no adverse opinion could be formed against them on the ground that they did not do so at the time of filling of the suit as they could not deposit the amount without permission of the Court; that prompt filing of the suit by the respondents within two months and six days from the date of payment of last installment speaks volume about the fact that they were ever ready to perform their part of contract; that even during the evidence PW-4 stated in clear cut words that respondents were ready to pay the balance amount upon execution of formal sale deed by the petitioner in their favour. To fortify his contentions, learned counsel for the

respondents has relied upon the cases reported as "*PROVINCE OF PUNJAB and others versus MUHAMMAD IQBAL and others*" (**2010 YLR 2759**), "*Malik YARAN Khan versus CHIEF LAND COMMISSIONER, PUNJAB, LAHORE*" (**2012 MLD 78**), "*Begum Syeda AZRA MASOOD versus Begum NOSHABA MOEEN and others*" (**2007 SCMR 914**), "*GHULAM HUSSAIN RAMZAN ALI versus COLLECTOR OF CUSTOMS (PREVENTIVE), KARACHI"* (**2014 SCMR 1594**), "*Messrs BLUE STAR SPINNING MILLS LTD. versus COLLECTOR OF SALES TAX and others*" (**2013 SCMR 587**), "*MUHAMMAD LATIF Khan and 17 others versus MUHAMMAD RASHEED Khan and 63 others*" (**2012 MLD 86**), "*HAFEEZ Ahmad and others versus CIVIL JUDGE, LAHORE and others*" (**PLD 2012 Supreme Court 400**), "*LAHORE DEVELOPMENT AUTHORITY versus Mst. SHARIFAN Bibi and another*" (**PLD 2010 Supreme Court 705**), "*ABDUL QADIR and 2 others versus JAHANGIR Khan and others*" (**2022 SCMR 321**) and "*PROVINCE OF PUNJAB and others versus MUHAMMAD ARIF AND COMPANY*" (**PLD 2022 Lahore 596**).

5. I have heard the learned counsel for the parties at full length and also gone through the record minutely with their able assistance.

6. Admittedly suit property belonged to the petitioner who purchased the same through mutation No.518 dated 08.01.2001. There is no dispute that petitioner agreed to sell the suit property to respondents through agreement to sell dated 13.06.2002 for consideration of Rs.3,50,000/- and after receipt of Rs.100,000/- executed a receipt on the same day in this regard. Although petitioner did not deny the execution of agreement to sell and receipt of earnest money but the respondents to

prove their contentions produced Bakht Ali Scriber as P.W-1 who deposed that he on the asking of petitioner had written an agreement to sell with regard to the suit property in favour of respondents and receipt of Rs.100,000/-. He further deposed that said agreement to sell Exh.P-1 is written and signed by him and said document was entered by him in his register at Sr. No.17 on 13.06.2002. He also deposed that receipt Exh.P-2 was also written and signed by him. He further deposed that petitioner also put his signature and thumb impression on his register and also got incorporated his identity card number. He maintained that he read over both the documents to the petitioner, respondents and attested witnesses who after understanding the same signed it. Respondents produced Ch. Muhammad Tufail attesting witness as P.W-2 and Muhammad Bashir attesting witness as P.W-3. Both the witnesses stated that Exh.P-1 and Exh.P-2 were written before them and they put their signatures and also identified their signatures. One of the respondents namely Zulfiqar Ali appeared as P.W-4 and deposed in the same lines as pleaded in the plaint. All the said witnesses were not cross-examined due to ex-parte proceedings initiated against the petitioner. In documentary evidence respondents produced agreement to sell along with copy of national identity card of the petitioner as Exh.P-1, receipt of Rs.100,000/- as Exh.P-2, copy of record of rights for the years 2002-03 as Exh.P-3. This documentary evidence also remained un-rebutted

7. Petitioner took a specific stance that agreement to sell dated 13.06.2002 was cancelled due to non-performance of the conditions because respondents failed to pay remaining consideration amount as per

terms of the agreement within time, therefore, time is essence of the contract. He also pleaded that in this regard he sent a notice dated 18.09.2002 through registered envelope acknowledgement due to the respondents wherein he specifically asked them if they failed to pay remaining consideration amount within a period of two days, sale bargain shall be deemed to be cancelled. The petitioner failed to produce any such notice before the learned trial court. There is no cavil with the proposition that pleadings are not evidence themselves and the facts pleaded in the pleadings should be proved through evidence.

8. Now question for determination is whether time was the essence of contract or not, same can be deciphered from the recital of agreement to sell between the parties. For convenience of reference, agreement executed between the parties on 13.06.2002 is reproduced in verbatim as under:-

"اقرارنامہ بیع

منکہ اشتیاق سلیم ولد نعمت علی ذات آرائیں بعمر 44 سال سکنہ کالج روڈ تحصیل لیاقت پور ضلع رحیم یار خان شناختی کارڈ نمبر 251094-58-361 کا ہوں۔ بقائمی ہوش و حواسِ خمسہ بلا جبر و کراہ تحریر کر دیتا ہوں کہ مقرار اراضی زرعی کھاتہ نمبر 6 برقبہ کھاتہ 133K-17M کا 2677/180 حصہ برقبہ متقلہ 9K-0M چک نمبر 19/A تحصیل لیاقت پور بروئے انتقال نمبر 518 منظور شدہ مورخہ 08/01/2001 مالک قابض متصرف ہے۔ یہ کہ قبل ازیں ہمہ قسم کے بار و کفالت سے پاک صاف ہے۔ من مقر اپنی ذاتی ضرورت کے پیش نظر اپنی اراضی زرعی مشترکہ بالا کا سودا بالعوض مبلغ تین لاکھ پچاس ہزار روپے -/350,000 بدست و بحق سید ذوالفقار علی شاہ، مختیار حسین شاہ، افتخار احمد شاہ پسران سید نذیر حسین شاہ ساکنان مہاجر کالونی لیاقت پور بحصہ برابر ضلع رحیم یار خان طے کر کہ مبلغ ایک لاکھ روپے -/100,000 ہے۔ بطور پیشگی ازاں مشتریان وصول پالئے ہیں۔ قبضہ اراضی زرعی مستطیل نمبر 3/306 کلہ نمبر 11-6/25/4، 306/9-2/5 شرقی ودیگر جملہ حقوق معہ وسائل آبپاشی داخلی-خارجی درختان ثمر دار و غیر ثمر دار و دیگر جملہ حقوق بیعہ متعلقہ اش حوالہ مشتریاں مذکوران کر رہا ہے۔ بقیہ زرِ ثمن میں سے مبلغ ایک لاکھ روپے ماہ اگست 2002ء کے پہلے ہفتہ مقر ازاں مشتریان وصول کرے گا۔ اور مشتریان ادا کرنے کے پابند ہوں گے۔ اسکے بعد بقیہ زرِ ثمن مبلغ

ایک لاکھ پچاس ہزار روپے -/150,000 روپے مورخہ 31-10-2002 کو ازاں مشتریان وصول کر کے رجسٹری بیعنامہ یا انتقال کرا دونگا۔ معاہدہ ہذا کی پابندی مقرو وارثان مقرپر لازمی ہو گی۔ اگر مشتریان نے تاریخ مقررہ تک بقیہ رقم ادا نہ کی تو زرِ پیشگی ضبط تصور ہو گی۔ سودا منسوخ اور کالعدم ہو گا۔ اگر مقر نے رجسٹری بیعنامہ یا انتقال نہ کرایا تو مشتریان کو حق حاصل ہو گا کہ وہ عدالت مجاز میں مقر کے خلاف دعویٰ دائر کر کے اپنے حق میں ڈگری کرا سکتے ہیں۔ مقر کو کوئی اعتراض نہ ہو گا۔ حرجہ خرچہ ہمہ قسم بذمہ من مقرپر ہو گا۔ اقرارنامہ ہذا سن لیا ہے سمجھ لیا ہے۔ جو کہ تسلیم ہے۔ سند آ تحریر کر دیا ہے۔ تحریر 13/06/2002."

9. Perusal of said agreement to sell, although it does state that remaining consideration amount of Rs.100,000/- was to be paid in the 1st week of August, 2002 and Rs.1,50,000/- was to be paid on 31.10.2002 and in case of failure the sale bargain was to be cancelled and earnest money be forfeited. It is also evident from the said document that it is a unilateral agreement and written on behalf of the petitioner and the signatures/thumb impressions of respondents are missing on it.

10. However, by now it is well-settled that what is to be determined in such like cases is not the form of document but the intention of the parties i.e. that time should be of essence of the contract.

It is well-settled principle of law that in contracts relating to immovable property time is not essence of contract. In this regard the observation of Lord Viscound Halodone in "*Jamsheed Rhoda Ram Irani V. Bujrgi Dhunni Bhi*" (**AIR 1915 Privy Council 83 at Page 85**) is relevant, which is as under:-

> *"Prima facie, equity treats the importance of each time limit as being subordinate to main purpose of the parties and it will enjoin specific performance notwithstanding that from the point of view of court of law the contract has and been literally performed by the plaintiff as regards the time limit specified."*

In case of "*Abdul Hamid v. Abbas Bhai*" (**PLD 1962 Supreme Court 1**) it has been held while interpreting Section 55 of the Contract Act, 1872 by the Honorable Supreme Court of Pakistan as under:-

> *"An intention to make time of the essence of the contract must be expressed in unmistakable language; it may be inferred from what passed between the parties before, but not after, the contract is made."*

It was also laid down in that case that:-

> *"Equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time."*

In case reported as "*Seth ESSABHOY versus SABOOR AHMAD*" (**PLD 1973 SC 39**) the principle of law has been envisaged by the Honorable Supreme Court that:-

> *"It is a well-settled principle of law that in contracts relating to immovable property, time is not of the essence of the contract, and the claim of the appellant, even if were accepted that he had given three days' notice to the respondent for completion of the contract, failing which it would come to an end, cannot at all be considered to be reasonable time."*

In case of "*Ghulam Nabi and others v. Seth Muhammad Yaqub*" (**PLD 1983 Supreme Court 344**) similar view was affirmed by the august Supreme Court.

In case of "*Muhammad Sharif v. Mst. Fauji alias Phaji through legal heirs*" (**1998 SCMR 2485**) while interpreting Section 55 of the Contract Act (IX of 1872) the Honorable Supreme Court enunciated the principle to determine the time of the essence of contract of particular case in the following words:-

> *"In order to determine whether, in relation to a particular contract time is, or is not of essence, intention of the parties in terms of Section 55 of the Contract Act is to be assessed."*

Further observed:-

> *"Such an intention is to be gathered from the terms of contract itself, as translated by the conduct of the parties and attending circumstances. The terms themselves are to be construed with reference to the spirit and substance rather than the bare words or recitals, in a deed."*

Merely an express provision in agreement specifying certain time limit for performance of contractual undertaking on part of promisee/vendee in case of sale of immovable property, would not make specified time as essence of contract in absence of any such specified intendment from construction of document of contract. In the absence of a provision in the agreement to sell an immovable property that the time fixed for performance of the contract is to be treated as the essence of contract, the time fixed for performance of the contract is not treated as the essence of contract. It was so, reiterated in "*Mrs. Mussarat Shaukat Ali v. Mrs. Safia Khatoon and others*" (**1994 SCMR 2189**) that mere mention of some period or inclusion of forfeiture clause would not have an effect that time is essence of contract and "delay simpliciter which is short of period of limitation prescribed under the law is not enough to disentitle a plaintiff to the relief of specific performance."

11. It is also matter of fact that petitioner pleaded in his written statement that he gave notice to the respondents on 18.09.2002 with a direction to pay balance consideration amount within two days and said notice was given after the date of first installment i.e., first week of August, 2002. This fact also suggest that time was not essence of contract.

12. The question, which of the parties was at fault in performing its part of agreement is a question of fact and inference can only be drawn from the record.

The respondents specifically pleaded in their plaint as under:-

"حالانکہ مدعیان اقرار نامہ بیع متدعویہ میں درج شدہ تواریخ سے قبل اور درج شدہ تواریخ پر بھی بقیہ زرثمن کا انتظام کر کے مدعا علیہ کے روبرو تقاضا کرتے رہے کہ مدعا علیہ اپنے معاہدے کا ایفا کرے اور بقیہ زرثمن وصول کر کے جائیداد متدعویہ کی حسب ضابطہ رجسٹری/انتقال بحق مدعیان کرا دے چونکہ مدعا علیہ Malafide تھا اور اسکی نیت میں فتور تھا اور مدعیان کو ایک سازش کے تحت وعدہ فردا پر ٹالتا رہا اس طرح مدعیان کسی NEGLIGENCE کے مرتکب نہیں ہوتے اور اب بھی بقیہ زرثمن بروقت ادا کرنے کو تیار ہیں۔"

One of the plaintiffs while recording his statement as P.W-4 stated as under:-

"میں نے مدعا علیہ کو بقیہ زرثمن کی وصولی اور منتقلی جائیداد کا تقاضا کیا لیکن وہ دیگر لوگوں سے جائیداد متدعویہ کی سودابازی میں مصروف ہو گیا اور اس نے ساز باز شروع کر دی اور منحرف ہو کر جائیداد متدعویہ کا قبضہ مجھ سے چھین لیا۔ جو کہ ہم تکمیل معاہدہ بیع میں پوری کوشش کی ہے ہم کئی مرتبہ گئے ہیں۔"

Said portion was remained unchallenged. Petitioner failed to rebut the stance of respondents, therefore, inference can be drawn that he was at fault in fulfilling the agreement.

13. There is no cavil with the proposition that where defendant found to have committed breach of contract, it is not obligatory on the part of plaintiff to prove his willingness to perform it. For reference Seth

Essabhoy judgment referred supra, whereby august Supreme Court of Pakistan observed as under:-

> *"However, in cases where the defendant himself has committed breach of the contract, it is not obligatory on the complainant in a suit for specific performance to prove his willingness to perform it up to the date of the filing of the suit. In this connection, the observations of Lord Mansfield in Jones v. Barkley (1) may be usefully cited:-*
>
> > *"The party must show that he was ready, but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther and do a nugatory act."*
>
> *Where the defendant definitely repudiates the contract, or commits breach thereof, the plaintiff is absolved from showing that he was ready and willing to perform his part of the contract."*
>
> *(1) (178) 2 Dougl. 684*

14. The failure to perform part of contract by the date fixed in the agreement to sell i.e., for payment of remaining consideration amount is not a ground for refusing relief of specific performance unless the circumstances must be highlighted and proved by the owner-vendor of the land that time is essence of the contract. Section 55 of the Contract Act, 1872 deals with the effects of the failure of a party to perform its part of the contract where time is essence of the contract and the contracts where the time is not the essence of the contract. For convenience of reference, the said provision is reproduced herein below:-:

> ***"Section 55. Effect of failure to perform at fixed time, in contract in which time is essential*** *When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before a specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.*
>
> ***Effect of such failure when time is not essential****---If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.*

> ***Effect of acceptance of performance at time other than that agreed upon***------*If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so."*

From above, it is vividly clear that intention to make time of the essence of the contract must be expressed in unmistakable language and it can be inferred from what passed between the parties before but not after the contract is made. A mere mention of a specified period in an agreement for completion of sale and payment of balance consideration amount would not make the time as essence of the contract unless it is expressly intended by the parties and the terms of the contract do not permit any other interpretation. This question has to be decided according to the intention of the parties reflecting in the agreement, its terms, conduct of the parties after the agreement and all the attending circumstances. Reliance is placed upon the case reported as *"Mst. AMINA BIBI versus MUDASSAR AZIZ"* (**PLD 2003 Supreme Court 430**) wherein it has *inter alia* been held as under: -

> *"12.Generally speaking, specific performance of a contract of sale of immovable property has been granted by the Courts although there has been a failure to keep the dates assigned by it, if justice could be done between the parties and if nothing in (a) the express stipulation of the parties, (b) the nature of the property, or (c) the surrounding circumstances make it inequitable to grant the relief.*
> *13. It is well-settled that intention to make time of the essence of the contract must be expressed in unmistakable language and it may be inferred from what passed between the parties before, but not after, the contract is made. A mere mention of a specified period of an agreement for completion of sale has been held as not to make the time of essence of the contract. In contracts of sale of immovable property, ordinarily, time is not considered to be the essence of the contract unless it was expressly intended by the parties and the terms of the contract do not permit of any other interpretation."*

Similarly, in case of "*MUHAMMAD HUSSAIN and others versus. Dr. ZAHOOR ALAM"* (**2010 SCMR 286**) the issue, under discussion, was clinched in the following manner:-

> *"In the contract relating to immovable property time is not generally the essence of the contract in the failure to perform part of the contract by the date fixed in the agreement to sell i.e. for execution of sale deed is not a ground for refusing specific performance unless the circumstances must be highlighted and proved by the owner of the land that time is essence of the contract in view of the law laid down by this Court in various pronouncements. See Abdul Hamid's case (PLD 1962 SC 1) Seth Essabhy's case (PLD 1973 SC 39)."*

Likewise, the august Supreme Court of Pakistan in case titled "*MUHAMMAD ABDUR REHMAN QURESHI Versus SAGHEER AHMED*" (**2017 SCMR 1696**) while interpreting that whether time is essence of the contract in the real estate transactions held as under : -

> *"It must be interpreted and applied specifically considering the facts and circumstances of each case to balance equities, keeping the standards of reasonability in mind and ensuring that injustice is not done to either side."*

If the question as to whether the time was essence of the agreements entered between the parties is adjudged on the touchstone of the afore-referred judgments of the Hon'ble Supreme Court there leaves no ambiguity that according to the recitals of agreement to sell (Exh.P-1), the respondents were to pay balance consideration amount in two installments. In this background, it can safely be concluded that the time was not essence of the contract.

15. There is no cavil with the proposition that it is not incumbent upon the Court to decree every suit for specific performance if the circumstances of the case require otherwise. As far as the case in hand is concerned, despite addressing the Court at length, learned counsel for the

petitioner has not been able to convince me with solid reason as to why the suit of the respondents could not be decreed. It is admitted proposition that on the one hand the petitioner received Rs.100,000/- from the respondents in part performance of the contract and on the other hand retained the possession of the suit property which fact also stands proof of the fact that the petitioner was not ready to perform his part of the contract.

16. It is relevant to note that Section 22 of the Specific Relief Act, 1877 deals with discretion to grant of decree for specific performance. The said provision is reproduced herein below:-

> *"22.* ***Discretion as to decreeing specific performance.****—The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.*
> *The following are cases in which the Court may properly exercise a discretion not to decree specific performance:*
>
> *(I) Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.*
>
> *(II) Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.*
>
> *(III) Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance."*

A perusal of above-quoted provision shows that grant of decree for specific performance is discretionary in nature and such discretion should be justly exercised. The Hon'ble Supreme Court of Pakistan in the case reported as "*Mrs MUSSARAT SHAUKAT ALI versus Mrs. SAFIA KHATOON and others*" (**1994 SCMR 2189**) highlighted the principles for grant of decree for specific performance in the following words: -

> *"It is true that grant of relief of specific performance is discretionary with the Court but this discretion cannot be exercised arbitrarily. The relief of specific performance being an equitable relief, it can be refused by the Court only if the equities in the case are against the plaintiff. The Court while refusing to grant a decree for specific performance to a plaintiff must find something in the conduct of plaintiff which disentitled him to the grant of equitable relief of specific performance, or the Court reaches the conclusion that on account of delay in seeking the relief, the circumstances have so materially changed that it would be unjust to enforce the agreement specifically. The specific performance of a contract cannot be refused merely – because it is lawful for the court to refuse it. Section 22 of the Specific Relief Act, though not a exhaustive provides some instances in which the specific relief of a contract may be refused by the Court in its jurisdiction."*

It was further held in "*LIAQAT ALI KHAN and others versus FALAK SHER and others*" (**PLD 2014 Supreme Court 506**) that—

> *"A plain reading of above reproduced statutory provision leads to a definite conclusion that the role of specific performance claimed by respondents Nos.1 to 4 in their suit is, purely discretionary in nature and the court is not bound to grant such relief merely as it is lawful to do so. At the same time, the discretion to be exercised by the court shall not be arbitrary, but it should be based on sound and reasonable analysis of the relevant facts of each case, guided by judicial principles and capable of correction by a court of appeal. Moreover, in sub-paragraphs Nos.i, ii and iii of section 22 (ibid) some instances have been given, wherein the court can refuse to exercise its discretion to pass a decree for specific performance. A careful reading of these instances, which are self-explanatory, further amplify vast powers of the court in the matter of exercise of its discretion for ordering specific performance or otherwise. When the above reproduced provision of law is read in conjunction with the case law cited at the Bar by both the learned Senior Advocate Supreme Courts, the things as regards powers of the Court in exercising its discretion, became even more clear that there is no two plus two, equal to four formula available with any court of law for this purpose, which can be applied through cut and paste device to all cases of such nature. Conversely, it will be the peculiar facts and circumstances of each case, particularly, there terms of the agreement between the parties, its language, their subsequent conduct and other surrounding circumstances, which will enable the court to decide whether the discretion in terms of section22(ibid) ought to be exercised in favour of specific performance or not. Besides, some well articulated judgments on the subject, have further broadened the scope of exercise of such discretion of the Court by way of awarding reasonable compensation to the parties, keeping in view the other surrounding circumstances, such as rate of inflation, having direct bearing the value of suit property, inordinate delay/passage of*

> *time, and change in the circumstances or status of the subject property etc."*

Moreover, the issue, under discussion, has elaborately been dealt with in case of "*Mrs. ZAKIA HUSSAIN and another versus Syed FAROOQ HUSSAIN*" (**PLD 2020 Supreme Court 401**) in the following manner: -

> *"It is time and again held by this court that specific performance of a contract is essentially an equitable and discretionary relief and the court seized of the matter is in a better position to decide and resolve not simply according to the spirit of the law but also in accordance with the principles of substantial justice by keeping in mind peculiar facts and circumstance of each case. It cannot be claimed as a matter of right. The discretion to be exercised by the court requires that it should not be arbitrary but should be sound and reasonable guided by judicial principles and capable of correction by a court of appeal. Such an exercise of grant or refusal of relief would depend on the facts and circumstances of each case and also the conduct of the parties."*

17. It is relevant to note over here that discretionary relief cannot be denied to a litigant, who otherwise is vigilant always ready and willing to perform his part of obligation, merely because his *lis* remained pending for many years in the court. Increase of price of the property during the time when causes remain pending in courts, not *ipso facto* disentitles the purchaser to seek discretionary relief of specific performance. Rise in the price of the property may be relevant factor in denying the relief of specific performance, keeping in view the conduct of the vendee, date of agreement of sale, time agreed to performance and time of filing of the suit before trial court. In the present case, time for performance of the agreement to sell was 31.10.2002, respondents instituted their suit for specific performance on 06.01.2003 just after two months and six days and deposited the balance sale consideration in terms of the order passed by the court despite the fact that they were not in possession of the suit

property. The said fact alone is sufficient to prove bona fide of the respondents towards performance of their part of the contract.

18. Now, I would like to take up the objection of limitation. This civil revision was filed on 28.05.2009 against judgment and decree, dated 21.02.2009 passed by the learned lower appellate Court after the expiry of 96 days. The petitioner submitted copy form for obtaining the certified copies on 10.04.2009. Copy was prepared and collected on the same day i.e., 10.04.2009. The petitioner filed an application (C.M.No.1734 of 2009/BWP) under sections 5 & 12 of the Limitation Act, 1908 for extension of time/condonation of delay on 17.06.2009. In his application for condonation of delay, the petitioner took a ground that he remained seriously ill, admitted in Hospital where his Hernia operation was conducted and doctor advised him for complete bed rest for three months. Said application is without any supportive evidence. The petitioner was supposed to file the revision petition within a period of 90 days but the same having been filed beyond the prescribed period of limitation, therefore, was barred by the law of limitation. Although petitioner moved said application (C.M.No.1734 of 2009/BWP) on 17.06.2009 but he did not press as neither any notice was issued to the respondents nor it was admitted for hearing. The august Supreme Court of Pakistan in the case reported as *"PROVINCE OF PUNJAB through District Officer Revenue, Rawalpindi and others versus MUHAMAMD SARWAR"* (**2014 SCMR 1358**) while dealing with the fate of time barred revision petition has *inter alia* held as under: -

> "*The second proviso thereto in unambiguous terms lays down the period of limitation for applying to the Court by mentioning*

> *that all other statutory provisions prescribing time period in which a matter is to brought before the Court the second proviso to section 115(1), C.P.C. to be applied with the same vigour. Thus, where an aggrieved party seeks redressal against the Judgement or order through the revisional powers of the Court under section 115, C.P.C. he has ninety days to make the application, failing which the application is liable to be dismissed."*

It is also relevant to mention that if Statute governing proceedings does not prescribe period of limitation then proceedings instituted there under would be governed by Limitation Act, 1908 but where law under which proceedings have been instituted prescribes period of limitation then benefit of section 5 of the said Act cannot be availed unless the same had been made applicable as per section 29(2) of the Limitation At, 1908. Sections 5 and 29 of the Limitation Act, 1908 reads as under: -

> ***S.5****: Extension of period in certain cases: Any appeal or application for a revision or a review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefore, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application such period."*
>
> ***29. Savings****: (**1**) Nothing in this Act shall affect section 25 of the Contract Act, 1872.*
> *(**2**). Where any special or local law prescribes for any suit, appeal or application, a period of limitation different from the period prescribed thereto by the First Schedule, the provisions of section 3 shall apply, as if such period were prescribed therefore in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law-*

> ***(a)*** *the provisions contained in section 4, sections 9 to 18 and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and*
>
> ***(b)*** *the remaining provisions of this Act shall not apply."*
>
> *(**3**): Nothing in this Act shall apply to suits under Divorce Act, 1869 (IV of 1869)*
>
> *(**4**): Sections 26 and 27 and the definition of "easement" in section 2 shall not apply to cases arising in territories to which the Easement Act, 1882, may before the time being extend."*

Insofar as the case in hand is concerned, Section 5 of the Limitation Act, 1908 is not applicable in the light of Section 29(2) of said Act, as Section 115 of C.P.C. itself prescribes 90 days for filing a revision petition, therefore, provision of section 5 of the Limitation Act was not available for condonation of delay or extension of time. Reliance is placed upon *"ALLAH DINO and another versus MUHAMMAD SHAH and others"* (**2001 SCMR 286**) wherein it has *inter alia* been held as under: -

> *"There is no cavil with the argument that if the Statute governing the proceedings does not prescribe period of limitation, the proceedings instituted thereunder shall be controlled by the Limitation Act as a Whole. But where the law under which proceedings have been launched prescribes itself a period of limitation like under section 115, C.P.C. then benefit of section 5 of the Limitation Act cannot be availed unless it has been made applicable as per section 29(2) of the Limitation Act."*

In this regard reliance is also placed upon "*CITY DISTRICT GOVERNMENT, LAHORE through District Coordination Officer, Lahore versus, Mian MUHAMMAD SAEED AMIN"* (**2006 SCMR 676**), *"Begum Syeda AZRA MASOOD versus Begum NOSHABA MOEEN and others"* (**2007 SCMR 914**), *"PROVINCE OF PUNJAB through Collector and*

*others versus MUHAMAMD FAROOQ and others"* (**PLD 2010 Supreme Court 582**) and *"HAFEEZ AHMAD and others versus CIVIL JUDGE, LAHORE and others*"(**PLD 2012 Supreme Court 400**). Therefore, the application filed by the petitioner under Section 5 of the Limitation Act, 1908 was not maintainable and is dismissed.

19. The limitation is not a mere technicality and once it expires, the right accrued in favour of the other side by operation of law cannot lightly be taken away. Reliance is placed on *"ASAD ALI and 9 others versus The BANK OF PUNJAB and others*" (**PLD 2020 SC 736**) wherein it has been held as under: -

> *"It is settled law that limitation is not a mere technicality (or a hyper technicality as it had been termed by the Tribunal). Once limitation expires, a right accrues in favour of the other side by operation of law which cannot lightly be taken away."*

20. It is well entrenched by now that delay defeats equity and the favors the vigilant and not the indolent. Learned counsel for the petitioner failed to satisfy this Court regarding the late filing of the revision petition. Therefore, this Civil Revision is also liable to be dismissed on the point of limitation.

21. So far as the case-law referred by the learned counsel for the petitioner is concerned, suffice it to note that the same is not applicable to the peculiar facts and circumstances of the present case.

22. I have not seen any illegality, irregularity and mis-reading or non-reading of evidence on the part of learned appellate Court while passing the impugned judgment and decree. The findings of the learned appellate Court on question of facts and law having based upon proper

appreciation of oral as well as documentary evidence produced in the suit are not open to any interference.

23. The epitome of above discussion is that instant Revision Petition is without any merits and substance, hence, the same is, hereby ***dismissed*** with no order as to cost.

**(AHMAD NADEEM ARSHAD)**
**JUDGE**

**Qurban**

Approved for reporting

**JUDGE**

Announced in open Court on _____

**JUDGE**