

Judgment Sheet
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

C.R. No.76121 of 2022

Muhammad Ali Housing Scheme, etc.

Versus

Kamran Latif, etc.

J U D G M E N T

Date of Hearing	30.05.2023
For the petitioners	Mr. Imran Ali, Advocate
For Respondents.	Malik Liaqat Ali Raj, Advocate.

Raheel Kamran J: - The petitioners have assailed the judgment and decree dated 17.10.2022 passed by the learned Additional District Judge, Faisalabad whereby suit filed by respondent No.1 was decreed while allowing his appeal.

2. Brief facts of the case are that respondent No.1/plaintiff instituted a suit for confirmation of possession through specific performance of agreement to sell alleging therein that the petitioners developed a housing scheme with the name and style of Muhammad Ali Housing Scheme, situated at Chak No.222/RB, Faisalabad and respondent No.1 purchased plot No.134/C, measuring 6-Marlas 1-Sarsai, 2-Sqft from him against the consideration of Rs.2,447,407/- in presence of the witnesses, out of which an amount of Rs.489,481/- was paid as earnest money and possession was delivered and it was settled that remaining payment would be made through installments. It was further averred in the plaint that the petitioners got sanctioned the site plan and with their permission respondent No.1 raised construction over the plot. It was also stated in the plaint that respondent No.1/plaintiff paid all installments as per

schedule making payment of an amount of Rs.1,957,916/- out of the total consideration and was ready to pay the remaining sale consideration of an amount of Rs.489,491/-, however, the petitioners did not make any development in the society as per their promise rather they sent a notice dated 21.06.2018 to respondent No.1/plaintiff to make payment of extra land. The petitioners-defendants contested the said suit by filing written statement while controverting the stance of respondent No.1-plaintiff. It was *inter alia* averred in the written statement that respondent No.1-plaintiff committed default in the payment of 7th and 8th installments for an amount of Rs.489,491/- and was liable to late payment charges under clause 15 of the agreement/allotment letter amounting to Rs.126,962/- as on 14.09.2018. Prayer was made therein for dismissal of the suit. Out of divergent pleadings of the parties, as many as five issues were framed. The respondent-plaintiff deposited remaining installments/consideration in the trial Court vide order dated 26.08.2019. After recording evidence of the parties and hearing their counsels, the suit was dismissed by the trial Court vide judgment and decree dated 08.12.2021. Feeling aggrieved, respondent No.1 preferred appeal there-against and the same was accepted by the Appellate Court while decreeing his suit vide impugned judgment and decree dated 17.10.2022 to the following effect: -

"12.The plaintiff has categorically stated in his plaint that he has purchased suit property (detail fully been given in the head note of the plaint) from the defendant against consideration of Rs.24,47,407/- and he has already paid Rs.19,57,916/- to the defendants while submitting their statements leveled an allegation against the plaintiff/appellant that the plaintiff/appellant has made default regarding payment of remaining installments of the consideration amount; due to that reason, the defendants are entitled to receive late payment surcharge from the plaintiff/appellant. In these circumstances, execution of an agreement to sell in shape of allotment latter Exh.P1 has frankly been admitted by the defendants through their written statement; whereas, the appellant/plaintiff while showing his good intention has already deposited remaining installments/consideration amount in the learned trial court vide its order dated 26.08.2019. Now question arises as to whether the defendants are entitled to receive late payment surcharge from the

plaintiff/appellant, the Hon'ble Lahore High Court, Lahore through its esteemed judgment PLD 2015 CLD 1439 has answered this question and held that as such kind of late payment surcharge is un-Islamic and illegal. This court has further gone through contents of agreement to sell/allotment latter dated 27.07.2015 Exh.P1 and it has observed that time was not essence of the contract rather it has provided penal clause of late payment surcharge which is otherwise is illegal and un-Islamic. When possession of the suit property has already been handed over to the plaintiff and he has raised constructions upon the said suit property; the appellant/plaintiff is entitled to discretionary relief of specific performance as he has already paid entire consideration amount to the defendants and in the learned trial court vide its order dated 26.08.2019. In these circumstances, this court is of considered view that the plaintiff has successfully proved this issue; hence, this issue is decided in favour of the plaintiff."

3. Learned counsel for the petitioner contends that the petitioner was entitled to late payment surcharge in terms of clause-15 of the agreement/allotment letter issued to respondent No.1 which has been disregarded by the Appellate Court while erroneously relying on judgment of this Court in the case of "Muhammad Farooq Azam v. Bank Al-Falah Limited and others" (**2015 CLD 1439**). According to him, the said judgment is distinguishable on facts inasmuch as the same related to banking transaction whereas in the instant case late payment charges were payable under Section 74 of the Contract Act, 1872. He finally contends that even otherwise the suit of respondent No.1 could not be decreed in view of the provisions of Section 24(b) of the Specific Relief Act, 1877 as respondent failed to fulfil his part of performance as per agreement to sell/allotment letter which was an admitted fact.

4. Conversely, learned counsel for respondent No.1 contends that the respondent in this case had paid an amount of Rs.1,957,916/- to the petitioners out of the sale consideration and remaining amount of Rs.489,491/- was paid pursuant to the order passed by the trial Court. He further contends that dispute in this case is essentially regarding late payment charges for which the petitioners issued notice dated 15.11.2017 while claiming payable amount to be Rs.51,553/- in terms of clause 15

of the agreement/allotment letter. He maintains that possession of the suit property had already been delivered to respondent No.1, therefore, the contract stood substantially performed on his part. He finally contends that clause 15 of the agreement/allotment letter was not enforceable against the respondent/plaintiff as such but subject to determination by the trial Court of reasonable compensation not exceeding the amount so specified therein in terms of Section 74 of the Contract Act, 1872 which exercise was never carried out by the courts below.

5. Heard. Available record perused with assistance of the parties.

6. There is legal presumption in view of explanation to section 12 of the Specific Relief Act, 1877 that the breach of contract to transfer an immovable property cannot be adequately relieved by compensation in money. The burden to dislodge the above legal presumption is on the one who avers contrary to it. No doubt the jurisdiction to decree specific performance is discretionary, however, the exercise of such discretion is not arbitrary but reasonable and is guided by the judicial principles. In the suit for specific performance, if plaintiff makes any express averment in the pleadings of his readiness and willingness to perform his part of the contract and deposits the balance sale price as per direction of the Court then it would not be deemed to be his incapability of performing his part of the contract as envisaged under section 24(b) of the Specific Relief Act, 1877 rendering the contract non-enforceable, the suit cannot be dismissed. Reliance in this regard is placed on the case of Muhammad Asif Awan vs. Dawood Khan and others (2021 SCMR 1270). This Court finds the reasons recorded by the Appellate Court in paragraph No.12 of the impugned judgment, reproduced herein above, to be unexceptionable in so

far as the decree for specific performance cannot be refused to the respondent-plaintiff in the facts and circumstances of the instant case. The only question, however, is whether respondent No.1 is bound to pay the late payment charges on account of his failure to pay the installments on agreed dates? In this regard, the trial Court framed issue No.3, which is reproduced hereunder: -

“3. Whether the defendants are entitled to receive late payment charges? OPD”

The trial Court, vide its judgment dated 08.12.2021, decided the said issue in favour of the petitioners whereas the Appellate Court, vide impugned judgment, decided it against them while finding clause 15 of the agreement/allotment letter regarding surcharge against the injunctions of Islam.

7. It is noteworthy that clause (2) of Article 175 of the Constitution of the Islamic Republic of Pakistan, 1973 (“the Constitution”) provides that no Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law. The jurisdiction to declare any law or provision of law repugnant to the injunctions of Islam, as laid in the Holy Quran and the Sunnah of the Holy Prophet, is vested in the Federal Shariat Court under Article 203D of the Constitution whereas Article 203G of the Constitution imposes a bar upon any other Court or Tribunal including the Supreme Court, except for appeal before the Shariat Appellate Bench of the Supreme Court under Article 203F, to entertain proceedings or to exercise any power or jurisdiction in respect of any matter within the power or jurisdiction of the Shariat Court. The Appellate Court clearly lacked jurisdiction to declare any provision of the agreement/allotment letter to be repugnant to the injunctions of Islam. Validity and enforceability of any such provision is to be adjudicated on the touchstone of section 74 of the Contract Act,

1872. For that reason, the Appellate Court has erroneously relied upon the judgment of this Court in the case of Muhammad Farooq Azam v. Bank Al-Falah Limited and others (2015 CLD 1439) to declare clause 15 of the agreement/allotment letter to be un-Islamic and unenforceable. Additionally, the aforementioned judgment was rendered in a banking case, which manifestly has no relevance in the instant case.

8. Section 74 of the Contract Act, 1872 deals with a contract which provides the amount of compensation in the form of penalty or liquidated damages in case of breach. It postulates that in such cases, the party complaining of the breach, whether or not actual damage or loss is proved to have been caused thereby to receive from the party who has broken the contract, reasonable compensation not exceeding the amount so named or as the case may be the penalty stipulated for the breach. In the case of Province of West Pakistan v. Mistri Patel and Co. (PLD 1969 Supreme Court 80), it has been held by the Supreme Court:

“The award of compensation by the Court under section 74 of the Contract Act, will depend upon its finding as to what in the facts and circumstances of the case is reasonable compensation subject to the limit of the amount mentioned in the contract.”

It has been further held by the Supreme Court of Pakistan in the case of Khanzada Muhammad Abdul Haq Khan Khatak and Co. vs. WAPDA (1991 SCMR 1436):

“Where an amount is mentioned in the contract as penalty payable on breach of contract, the parties are entitled to recover actual damages not exceeding the amount mentioned in the contract but in case of liquidated damages, a party is entitled to recover the same from the opposite party in case of breach of contract. However, where the Court considers that the amount mentioned in the contract as liquidated damages is oppressive, or highly penal in nature the Court may refrain to grant such amount and itself determine the amount which is reasonable in the circumstances of a particular case.” (Emphasis supplied by this Court)

9. Clause 15 of the agreement/allotment letter stipulates late payment charges of Rs.1000/- per day for default in the payment of installment due on 10th of each month, otherwise the plot was not to be transferred. The aforementioned clause manifestly postulates compensation of late payment charges of Rs.1000/- per day at a uniform rate regardless of the differences in the total amount of default in each case. Undisputedly, there was delay in the payment of 7th and 8th installments on part of respondent No.1 despite delivery of possession of the plot in question to him. The petitioners are entitled to reasonable late payment charges for the period of default in the payment of aforementioned installments. This Court, however, finds the amount of compensation specified in clause 15 ibid, to be oppressive and highly penal in the facts and circumstances of instant case which cannot be allowed to the petitioners inasmuch as undisputedly respondent No.1 had paid well in time the first six installments and the delay was in relation to remaining two installments of Rs.489,491/- constituting 25% of the sale consideration for which late payment charges at the rate of Rs.1000/- per day (i.e. Rs.365,000/- per annum) are manifestly extortionate. No other reasonable amount of compensation has been claimed in the written statement and established by the petitioners in the instant case. Since there was no determination by the courts below of reasonable compensation, this Court deems it appropriate to hold the petitioners entitled to compensation in total of Rs.150,000/- for delay in the payment of last two installments which were deposited in the trial Court by respondent No.1 vide order dated 26.08.2019. The above figure of compensation is an approximation arrived at taking into account the State Bank of Pakistan's interest rates at the relevant time.

10. For the foregoing reasons, the titled civil revision is **disposed of** while maintaining the impugned judgment and

decree of specific performance passed by the Appellate Court in favour of respondent No.1 and against the petitioners subject to payment of compensation of late payment charges by respondent No.1 to the petitioners as mentioned above. There shall be no order as to costs.

**(RAHEEL KAMRAN)
JUDGE**

Approved for reporting.

Judge

Asim Shahzad