

Stereo.HCJDA-38

JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

R.F.A. No.67289 of 2019

Ghulam Hassan and others
v.
Ijaz Naseer and others

JUDGMENT

Dates of Hearing	21.2.2023, 22.2.2023, 23.2.2023, 27.2.2023, 28.2.2023, 02.3.2023, 06.3.2023, 08.3.2023, 09.3.2023, 13.3.2023 and 15.3.2023
Appellants by	M/s. Zubda-tul-Hussain, Irfan Ghaus Ghumman, Mian Ejaz Latif and Nusrat Ali Joiya, Advocates.
Respondents by	M/s. Tallat Farooq Sheikh, Maqbool Hussain Shaikh, Tahir Pervaiz, Shahrukh Sharif and Ahmad Ashfaq Sheikh, Advocates.

RASAAL HASAN SYED, J. This judgment will dispose of the present RFA as well as connected RFA No. 74715 of 2019 titled “Ijaz Naseer etc. v. Ghulam Hassan, etc.” as both arise from the judgment and decree dated 10.10.2019 of learned Civil Judge, Sialkot whereby suit for specific performance was partly decreed.

2. Respondent No.1 Ijaz Naseer instituted a suit for specific performance against the appellants and respondent Nos.2 to 4, to enforce agreement of sale dated 30.12.2012 with appellant No.1 Ghulam Hassan and Shams Ur Rehman (predecessor-in-interest of appellant Nos.2 to 6 and respondent Nos.2 & 3) as also agreement dated 30.6.2013 with appellant No.7 Mst. Zil-e-Huma for herself and for her minor daughter respondent No.4 Mst. Noor Fatima. The suit was contested, issues were framed and

evidence was duly recorded whereafter the learned Civil Judge seized of the matter partly decreed the suit against Ghulam Hassan and Mst. Nusrat Bibi, etc. (successors-in-interest of Shams Ur Rehman) and Mst. Zil-e-Huma widow of late Zeeshan and dismissed it to the extent of Mst. Rasheeda Bibi, mother of Zeeshan as well as Mst. Noor Fatima, minor daughter of Mst. Zil-e-Huma and Zeeshan son of Abdur Rehman. The judgment and decree of trial court has been assailed by Ghulam Hassan and others through the instant RFA while connected RFA No.74717 of 2019 titled "Ijaz Naseer, etc. v. Ghulam Hassan, etc." is preferred by respondent No.1 to the extent of adverse findings as recorded and relief declined.

3. Heard.

4. Scrutiny of the record reveals that respondent No.1, in his plaint, claimed that Ghulam Hassan and Shams Ur Rehman executed agreement of sale dated 30.12.2012 in respect of property known as "Abdur Rehman Market" a double storeyed building with shops, residential units, flats and land underneath thereto measuring 02 kanals and 05 marlas i.e. 45 marlas (bounded on East by Main Kashmir Road; West by Houses of Jaffer, etc; North by passage towards Islam Nagar and South by shops of Muhammad Rafique, as per jamabandi for the year 1966-67, bearing khewat No.112, khatauni No.379, square No.263, situated at Revenue Estate of Pacca Ghara, Tehsil and District Sialkot with Excise and Taxation record No: PT-I-BIII-12-S-127/RH/Shops, PT-1-BIII-12/S/129/RH plus shops and PT-1-BIII-12-S/127/B for the year 2001-02) in consideration of Rs.7,20,00,000/- . Earnest money in the sum of Rs.1,00,00,000/- by two separate cheques dated

30.5.2013 each amounting to Rs.50,00,000/- was paid. Shams Ur Rehman allegedly bound himself to get appellant No.7 Mst. Zil-e-Huma to agree for herself and respondent No.4 Mst. Noor Fatima to abide by the agreement to sell and that later said Mst. Zil-e-Huma allegedly consented to abide by the original sale agreement dated 30.12.2012 and executed a subsequent agreement dated 30.6.2013, for herself and on behalf of minor daughter Mst. Noor Fatima, wherein she acknowledged having received share of earnest money amounting to Rs. 10,00,000/- from Shams Ur Rehman deceased, the then father-in-law of Mst. Zil-e-Huma; and allegedly agreed to comply with the terms and conditions therein. Further alleged that after the agreement it came to the respondent plaintiff's knowledge that the property as a whole was not commercial, major portion thereof required commercialization and he took on the responsibility of its commercialization and spent additional amount of Rs.78,00,000/- towards this end which, according to respondent plaintiff, was verbally agreed to be deducted from the sale consideration at the time of attestation of sale deed and that in terms of the agreement post-dated cheque for Rs.6,20,00,000/- as balance sale consideration was issued in the name of the vendors which was delivered to them to be treated as guarantee/surety for the proposed sale deed agreed to be executed by 30.5.2014 and that the appellants refused to abide by the terms of the agreement, in result, legal notices were sent whereafter the suit for specific performance was instituted to enforce the agreements.

5. The appellants raised number of legal objections and also controverted material facts in their written statement,

explaining that the alleged agreement to sell dated 30.12.2012 contained fabricated and maneuvered contents, stamp-paper was never purchased by Ghulam Hassan or Shams Ur Rehman and that the earnest money was not in respect of the property mentioned in the plaint but was in respect of adjacent land measuring 28 marlas, on the western side of property and that no agreement to sell for minor's share could be executed without appointment of her guardian and that Mst. Zil-e-Huma was never appointed as guardian, she never executed any ratification document nor did ever consent to abide by the terms of the agreement dated 30.12.2012 and that Mst. Zil-e-Huma never received Rs. 10,00,000/- as earnest money and that she was a house-lady with whom no valid transaction was ever settled and that the two agreements claimed by respondent No.1 being independent could not be linked up nor composite suit could be filed on the basis thereof and that the suit was bad for misjoinder of alleged causes of action and parties.

6. Respondent No.1 produced Irfan Ul Haq as P.W.5 and Tahir Mehmood as P.W.6 to prove agreement to sell dated 30.12.2012 Ex.P-17. Irfan Ul Haq P.W.5 claimed himself to be scribe but admitted in cross-examination that he was not a regular scribe; he did not ever draft any other document prior to Ex.P-17 or thereafter and that he had no direct relationship with Ghulam Hassan and others and that he did not know the stamp-vendor from whom the stamp-paper was purchased and that he did not recall as to how many marlas were given in PT-1 record and that he did not mention in Ex.P-17 the number of property as per PT-1 and that the document did not mention that it was scribed by

him or that it was read over to the parties. Tahir Mehmood P.W.6, the other marginal witness of Ex.P-17, deposed that he had signed and thumb-marked the document as witness and in cross-examination he admitted that there were no recitals in the document regarding commercialization of the property and that he did not know if the document was ever attested and that in his presence the stamp-paper was not bought and that he did not read the PT-1. Respondent No.1 appeared as P.W.7 and deposed about the agreement dated 30.12.2012 Ex.P-17 and alleged that cheque for Rs.6,20,00,000/- for the balance sale price was to be encashed on 30.5.2014 and that in the property, one share was owned by Zeeshan son of Abdur Rehman, who was survived by widow Mst. Zil-e-Huma and a daughter Mst. Noor Fatima. In defence appellant No.1 Ghulam Hassan appeared as D.W.1, appellant No.7 Mst. Zil-e-Huma as D.W.2, Muhammad Waris as D.W. 3 and Nadeem Ahmad as D.W.4.

7. In so far as agreement of sale dated 30.12.2012 Ex.P-17, the trial court observed that its execution was proved; the document was executed only between respondent No.1 Ijaz Naseer and appellant No.1 Ghulam Hassan and Shams ur Rehman and that the legal heirs of Zeeshan (pre-deceased son of Abdur Rehman) were not privy to the document. It was observed that Ghulam Hussain and Abdur Rehman sons of Ghulam Muhammad owned 46 marlas (inclusive of 45 marlas subject-matter of the suit). Ghulam Hassan had sold 01 marla through registered sale deed, in result, his ownership in the plot was to the extent of 22 marlas while the remaining 23 marlas had devolved upon Abdur Rehman. Abdur Rehman having died and survived

by Shams Ur Rehman (son) and a pre-deceased son, namely, Zeeshan who was survived by mother Mst. Rasheeda Bibi (respondent No.2), widow Mst. Zil-e-Huma (appellant No.7) and minor daughter Mst. Noor Fatima (respondent No.4). It was further observed that the agreement was executed by Ghulam Hussain and Shams Ur Rehman his nephew while the other legal heirs of Abdur Rehman were not privy to the same. The findings are to the effect that the agreement Ex.P-17 was operative to the extent of the share of Ghulam Hassan and Shams Ur Rehman. Regarding agreement dated 30.6.2013 Ex.P-16 between respondent No.1 Ijaz Naseer and appellant No.7 Mst. Zil-e-Huma, the findings are that its execution was proved but that the agreement would be operative to the extent of share of Mst. Zil-e-Huma while the share of minor shall not be subject to any sale agreement; reason being that no agreement could be executed for and on behalf of the minor by a person who was not natural guardian or appointed guardian through court. It was also observed that Ex.P-16 will also not be operative against the share of respondent No.2 Mst. Rasheeda Bibi mother of Zeeshan who was not privy to the document. Based on these conclusions partial decree of performance of agreement was allowed.

8. Main objection to the judgment appears to be that the respondent could not prove that the property subject-matter of suit was the part of agreement of sale Ex.P-17 and that the findings that Ghulam Hassan and Shams Ur Rehman did not own 45 marlas in toto, was sufficient to prove that the agreement was not enforceable and that the agreement contained fabricated stance and that the partial

performance of the agreement to sell was impermissible and that the execution of the agreement Ex.P-16 which was an independent document could not be linked up with earlier agreement was not proved and that the plea of alleged ratification by Mst. Zil-e-Huma widow of deceased Zeeshan son of Abdur Rehman could not be established by any credible evidence.

9. Deeper analysis of the evidence, documents on record and the pleadings of the parties, shows that certain important questions involved in this matter need to be attended to; viz. whether the execution of two agreements was proved; could the property be identified with reference to document Ex.P-17 itself; whether the contents of document Ex.P-16 stood proved and, if so, whether the same could be linked up with the earlier agreement and could be subject-matter of one suit; and whether partial performance of the sale agreement in the peculiar circumstances of this case permissible.

10. In the plaint the respondent No.1 claimed specific performance of agreement dated 30.12.2012 which according to him was in respect of "Abdur Rehman Market", a double storeyed building comprising shops, residential units, flats and land underneath thereto measuring 02 kanals and 05 marlas i.e. 45 marlas bounded on East by Main Kashmir Road; West by houses of Jaffer, etc; North by passage towards Islam Nagar and South by shops of Muhammad Rafique, as per jamabandi for the year 1966-67, bearing khewat No.112, khatauni No.379, survey No.263, situated at Revenue Estate of Pacca Ghara, Tehsil and District Sialkot with Excise and Taxation record No:PT-I-BIII-12-S-127/RH/Shops, PT-1-BIII-12/S/129/RH

plus shops and PT-1-BIII-12-S/127/B for the year 2001-02. Perusal of Ex.P-17 shows that it does not describe the property as such. Bare reading of the document shows that the property has been described as "*arazi/plot baraqa pantaalees marlas (45 M) taqreeban maa jumla tameeraat, doube storey maa dukanaat*" bounded on North by Raasta to Islam Nagar, South shops of Muhammad Rafique, East by Main Kashmir Road and West by makanaat of Jaffar, etc., situated at Pacca Ghara, Tehsil and District Sialkot. It is manifest that the property subject-matter of sale in Ex.P-17 has not been described by khasra number, khewat number, khatauni number, square number or by property number as per record of the Excise & Taxation Department. Neither have khasra number, khewat number, khatauni number, square number or survey number been mentioned nor is any reference given to the jamabandi of 1966-67. It is nowhere mentioned in Ex.P-17 that the land comprised khewat No.112, khatauni No.379, square No.263, situated at Revenue Estate of Pacca Ghara, Tehsil and District Sialkot with Excise and Taxation record No: PT-I-BIII-12-S-127/RH/Shops,PT-1-BIII-12/S/129/RH plus shops and PT-1-BIII-12-S/127/B for the year 2001-02. Section 21(c) of Specific Relief Act, 1877 provides that specific performance of an agreement could not be allowed where the terms of the contract cannot be found with reasonable certainty. Reference can be made to the case of "*Fida Hussain v. Jalal Khan*" (**2002 CLC 1339**) and "*Muhammad Miskeen v. District Judge Attock and others*" (**2020 SCMR 406**) wherein it was observed to the effect that the agreement to sell in respect of the land shall give the necessary particulars to identify the land by reference to

khewat number, khatauni number, khasra number and that where the document lacked certainty it will not be enforceable. The approved principle is that description shall be such as to enable the court to determine with certainty and that in the absence of particulars of killa number or other definable particulars it will not be possible for the court to determine which part of land out of total area is subject-matter of the agreement to sell.

11. Respondent No.1 appears to have attempted to cover up this lacuna by producing documents of litigation in a suit titled "Mst. Saleem Akhtar v. Ghulam Hussain alias Ghulam Hassan, etc." in which he was not a party and an attempt was made to show that the property was under litigation and no one was prepared to purchase it and that the agreement of sale was executed upon settlement of the litigation wherein the description of property of Ghulam Muhammad inherited by the legal heirs was described by khasra number, khewat number, khatauni number and also property number as per record of the Excise & Taxation Department.

12. Perusal of the plaint in the instant suit shows that neither in the agreement Ex.P-17 nor in the plaint itself there is any reference of previous litigation or the plea of execution of the agreement after that litigation or settlement of the issue nor is the property described with reference to any previous litigation. In the absence of the foundation in the plaint of the facts pertaining to previous litigation and also the particulars of Revenue Record and that of the Excise & Taxation Department, with reference of that litigation either in agreement Ex.P-17 or in the plaint, any evidence produced by the plaintiff respondent

was inadmissible in view of the rule in case "Mst. Jannat Bibi v. Sher Muhammad and others" (1988 SCMR 1696).

These important aspects of the matter and deficiency in the agreement were ignored by the court below although the same had serious reflection on the fate of the claim under adjudication.

13. Another aspect of the matter was that the case of the respondent No.1 was that the vendors had agreed to sell 45 marlas being owners thereof. Being so, it was for him to prove that they were owners of such area of land. But the findings of the court below are that the property belonged to Ghulam Muhammad who was survived by Ghulam Hassan and Abdur Rehman; Abdur Rehman having died was survived by Shams Ur Rehman and Zeeshan; Zeeshan a pre-deceased son of Abdur Rehman was survived by his mother Mst. Rasheeda Bibi, widow Mst. Zil-e-Huma and minor daughter Mst. Noor Fatima who were also not party to the agreement Ex.P-17. The findings of trial court are that Mst. Rasheeda Bibi also did not sign the document and that neither was she privy to the document Ex.P-17 nor had she ever executed any separate agreement in favour of the plaintiff or ever consented to the agreement by Ghulam Hassan and Shams Ur Rehman. In view of the facts as emerge per respondent's own evidence Ghulam Hassan and Shams Ur Rehman could not claim more than 35 marlas, while respondent claimed sale agreement for 45 marlas of land. The agreement, as such, was not enforceable. Even otherwise the fact that the court's own findings were that Ghulam Hassan and Shams Ur Rehman did not own 45 marlas and that the share of Zeeshan deceased and also his successors-in-interest was not included in the agreement

Ex.P-17, the same could not be enforced in law. Third aspect of the matter is that if the court had reached the conclusion that the minor daughter, the widow of Zeeshan and also the mother Mst. Rasheeda Bibi were also owners of the substantial part of the property and thus excluded the area of mother, Mst. Rasheeda Bibi and the minor Mst. Noor Fatima and granted relief to the extent of 35 marlas, it needs to be seen whether the property was divisible and if not whether the minor and the widow being co-owners in every inch thereof, would it be possible to determine specific portion as would fall to the lot of Ghulam Hassan and Shams Ur Rehman and the other which belonged to the successors-in-interest of late Zeeshan and whether in suchlike cases specific performance shall be impermissible in view of the rule in "Sinaullah and others v. Muhammad Rafique and others" (**2005 SCMR 1408**) where it was observed by the Supreme Court Of Pakistan as follows:

"13. Partial specific performance can be ordered only in the cases strictly falling within the provisions of above sections 14, 15 and 16. Only those contracts can be specifically enforced which are capable of division then the part which can be specifically performed can be ordered to be specifically enforced. However, if an agreement or contract is such which is an indivisible agreement/contract consisting of one single transaction not permitting splitting up of the transaction, then such a case would not be covered by sections 14, 15 and 16 of the Specific Relief Act and the agreement or contract could not be ordered to be partially specifically performed..."

"15. There is yet another aspect which will be an impediment in the way of partial performance of the agreement to sell dated 26-9-1972 when it was not possible to clearly ascertain the part or portion of the demised land which belonged to respondents Nos.3 and 4 to the extent of their share of 5/24,

partial performance would not be possible as it would not be possible for the parties to specify or identify the portion to the extent of 5/24 out of the demised land. Besides, respondent Nos.5 to 10 the female co-sharers were holder of the majority share in the demised land, which would not be the subject-matter of partial performance of the agreement dated 26-9-1972, therefore, it would cause prejudice to the female co-sharers and would operate to their disadvantage..."

14. As regards the share of Mst. Rasheeda Bibi mother of Zeeshan there was no explanation either in Ex.P-17 or in Ex.P-16 or in the plaint itself or in the statement of plaintiff as P.W.7. Property being compact unit it could not be claimed with any specification as to the area which could fall to the lot of Ghulam Hassan and Shams Ur Rehman and as to what area would fall in the lot of Mst. Rasheeda Bibi, Mst. Zil-e-Huma and Mst. Noor Fatima till such time the property is partitioned. Therefore, grant of specific performance was not permissible without specific identification of the property subject-matter of sale.

15. In the plaint the plaintiff claimed agreement of sale in respect of "Abdur Rehman Market" and that Shams Ur Rehman had bound himself to obtain the consent of Mst. Zil-e-Huma and her daughter to the sale agreement purportedly made with Ghulam Hassan and Shams Ur Rehman. Perusal of the agreement Ex.P-17 shows that there was no such stipulation in the document, rather the agreement shows that the agreement was being executed as owners of 45 marla property in favour of the plaintiff by Ghulam Hassan and Shams Ur Rehman.

16. As regards agreement Ex.P-16, it was statedly between the plaintiff respondent Ijaz Naseer and appellant No.7 Mst. Zil-e-Huma. It was claimed that Ghulam

Muhammad had two sons namely Ghulam Hassan and Abdur Rehman. On the demise of Abdur Rehman his share of property devolved upon his successors-in-interest, namely, Shams Ur Rehman (son), Zeeshan (son) and Mst. Rasheeda Bibi (widow). By virtue of the document Ex.P-16 it was claimed that Mst. Zil-e-Huma for herself and on behalf of her minor daughter Mst. Noor Fatima ratified the agreement Ex.P-17, acknowledged having received Rs.10,00,000/- from Shams Ur Rehman, her father-in-law, and agreed to abide by the terms of agreement Ex.P-17 for the transfer of her share in the property and also the share of her minor daughter. As per findings of the court below, Mst. Zil-e-Huma, mother of minor could not alienate or agree to alienate the property of minor daughter in the absence of any permission from the Guardian Court and that she being not competent, the alleged commitment to the extent of minor will not be enforceable.

17. In the cross-appeal, the point raised is that the minor was being looked-after by the family and that the contemplated deal was in the interest and welfare of the minor and, therefore, the claim against the minor could legitimately be enforced. The plea raised being fallacious was rightly repelled by the trial court. It is a settled rule that the mother could not alienate the property of the minor without permission of the Guardian Judge. Reference can be made to the case of "Muhammad Hanif v. Abdus Samad and others" (**PLD 2009 SC 751**) where it was observed to the effect that the mother being a de facto guardian could not make any binding transaction in respect of the share of the minors nor could she enter into a family arrangement on their behalf. In the case of

"Muhammad Ali through L.Rs., etc. v. Manzoor Ahmad"

(2008 SCMR 1031) it was observed to the effect that the agreement of sale executed by the mother of minor is void and that the same cannot be enforced nor its performance can be permitted in the civil suit.

18. In the presence of rule supra the view taken by the trial court, in respect of minor's interest does not call for any interference. As to the execution of such agreement and commitment or ratification by Mst. Zil-e-Huma it was denied in the written statement and also in her examination-in-chief. Even when confronted with the document, she stated that she had seen the same for the first time. The respondent tried to take benefit of certain admissions which were allegedly made by the witness in cross-examination under the extreme pressure of extensive questioning which possibly cannot help the respondent. Admittedly, Mst. Zil-e-Huma was a house-lady and she was illiterate who could only sign. It was claimed that she had allegedly acknowledged the receipt of Rs. 10,00,000/- from Shams Ur Rehman her father-in-law; strangely enough, Shams Ur Rehman is not privy to the document nor did he witness the same and as regards his absence there is no explanation. So much so Arslan Ur Rehman, son of Shams Ur Rehman, with whom Mst. Zil-e-Huma was later married after the death of her husband Zeeshan, has also neither attested the document nor witnessed the same nor was he brought into the witness-box. It is settled rule that where the execution of document is claimed from an illiterate and ignorant pardanasheen lady the beneficiary has to prove the same by producing credible evidence as to the execution of document by the lady and

also the further fact that such transaction was explained to the executant who had also had independent advice at the relevant time. It is a rule that even a semi-literate parda observing lady is entitled to the protection of law governing such lady and that where at the time of execution she had no independent advice of her close relative and that the contents of the document were never read over to her nor she was explained about the transaction, the beneficiary will have failed to discharge the onus and document cannot be used detrimental to the interest of alleged transferee. In the instant case Ex.P-16 is not witnessed by any of the close relatives of Mst. Zil-e-Huma nor any receipt for the payment of such a huge amount was produced. So much so no date, month, or year of alleged payment is disclosed nor nature of instrument by which the transfer of the amount took place was disclosed. The onus was upon the respondent plaintiff to prove the acknowledgement or ratification which having not been done, the document could not be deemed to have been proved by production of two witnesses who were not related to the lady nor had any blood relation with her particularly when one of them admitted that the plaintiff was his brother-in-law. The findings of the court below to the extent of execution of agreement Ex.P-16 by Mst. Zil-e-Huma are, accordingly, set aside.

19. One of the claims of the respondent plaintiff was that the property was sold as commercial but later it transpired that substantial part thereof was not commercialized and that he undertook the process of commercialization by expending from his own pocket which was verbally agreed to be adjusted from the sale consideration. Perusal of

Ex.P-17 shows that there was no such impression given to the vendee that the property was commercial nor there was any commitment for the commercialization either by the vendor or by the vendee at the expense of vendor. As per Article 102 of Qanun-e-Shahadat Order, 1984 where the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of a document, no evidence shall be given in proof of the terms of such contract and that the document itself for secondary evidence of its contents will be used for proving the transaction. Similarly, Article 103 of Qanun-e-Shahadat Order, 1984 excludes the admissibility of oral evidence where the terms of transaction are in writing and any such oral evidence which is attempted to be used for adding subtracting, contradicting varying or amending the terms of the contract is deemed to be inadmissible. In view of the settled rule the plea of oral agreement as to the alleged commercialization of the property or the commitment to allow adjustment of commercialization expenses from sale consideration being not part of Ex.P-17, was inadmissible. The learned Civil Judge rightly declined the claim of the petitioner in this regard to the extent of Ex.P-17. However, the learned Civil Judge incorrectly allowed the claim of adjustment of commercialization charges to the extent of share of Mst. Zil-e-Huma widow of Zeeshan son of Abdur Rehman on the erroneous assumption as if the alleged agreement/ratification by Ex.P-16 was proved. In view of the findings which have been recorded hereinabove, it is concluded that the existence of any such consent, acknowledgement or ratification by Mst. Zil-e-Huma through Ex.P-16 could not be proved, nor the document

could be used detrimental to her interest. In view of the findings supra, the findings of the court below in this regard stand set aside.

20. Under section 22 of the Specific Relief Act, 1877, the jurisdiction to grant decree for 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, which is to be exercised fairly, based on sound and reasonable judicial principles. For succeeding in a suit for specific performance, the intending buyer has to claim and prove that he was ready and willing to perform his part of reciprocal obligation as to the payment of balance consideration. While considering the question of readiness and willingness to perform the contract, it was observed in the case of "Abdul Hamid v. Abbas Bhai-Abdul Hussain" [PLD 1959 (W.P.) Kar. 629], that in the first place the willingness to perform contract in respect of purchase of the property, capacity to pay the requisite sale consideration in a reasonable time must be there, and if it is so, he shall have the intention to purchase the property by paying the sale consideration and that he was willing to pay the sale price within the stipulated period. In "Nazar Hussain and another v. Syed Iqbal Ahmad Qadri (Deceased) through his L.Rs. and another" (2022 SCMR 1216) it was observed that:

"5. A buyer's primary obligation in a contract of sale is to make payment of the balance sale consideration as stipulated in the contract. If the seller refused to receive payment the buyer must establish that he had the required money which was kept aside for the seller, for instance, by making a pay order or cashier cheque in his name.

This would show that the buyer no longer had access to the sale consideration. Alternatively, the buyer could have deposited it in court. The petitioners did neither. If a buyer does not fulfill his primary obligation to secure/tender the sale consideration and files suit, and does so without depositing the sale consideration in court, the buyer is placed in an advantageous position. In this case the agreement is dated 17 March 2004 and the suit was filed on 17 March 2007. And now in 2022, after eighteen years, it would be eminently unfair if the petitioners, the purported buyers are permitted to pay the same amount to the seller. We can take judicial notice of the fact that over time the price of land in Pakistan has increased and the value of the rupee has continuously depreciated. Therefore, if the suit was to be decreed now it would give an unfair advantage to the petitioners, who would have got the plot for what effectively would have been a lesser price (in real terms) than what the parties had agreed to in the agreement..."

The facts of the present case considered in proper sequence as noted supra, it is observed that it will not be fair, reasonable or equitable to grant specific performance at the belated stage in view of the conduct of the party and also in view of the legal infirmity in the document which rendered it unenforceable.

21. In the instant case, the document Ex.P-17 reveals that a sum of Rs.1,00,00,000/- was paid through two cheques to the Ghulam Hassan and Shams Ur Rehman defendants in the suit vide cheques dated 30.5.2013. The agreement was dated 30.12.2012 while posted-dated cheques for earnest money were delivered at the time which obviously means that no cash payment for consideration was paid immediately on the execution of the document rather the vendors had to wait for six months to receive the earnest money. In the document the cut-off date for the completion of deal was 30.5.2014. The plaintiff/respondent was required

to prove that he was ready and willing to perform the obligations as per agreement and that he had the necessary funds to pay the amount of balance consideration with intention to pay and that he made efforts to pay the balance price and these efforts ought to be reflected by production of evidence pertaining to tender of sale consideration through pay order or cross-cheque or through any other banking instrument. It is also a rule that from the date of agreement till the filing of suit and thereafter the buyer shall prove his readiness and willingness to perform the agreement. In the instant case respondent No.1 claimed delivery of cheque in the sum of Rs. 6,20,00,000/- as balance consideration which was to be used as surety/guarantee for the execution of the sale deed. On the face of record there was no intention to pay as the respondent knew that Shams Ur Rehman had already died on 28.3.2014 and, therefore, the issuance of cheque in his joint name was nothing but was a pretense to create evidence without having intention to pay. So much so delivery of cheque could not be proved. The respondent did not prove that he had the funds to pay the balance consideration as relevant statement of accounts were not produced and only the account statement pertaining to earnest money was produced. The plaintiff did not even tender the amount in court nor ever attempted to deposit the balance consideration till the passing of decree. It is a rule that in cases where the plaintiff's intentions are visible, and he has not proved his readiness and willingness to perform the contract by paying the balance consideration, relief of specific performance cannot be granted. Reference can be made to the rule in "Mst. Noor Jehan and others v. Saleem Shahadat" (2022 SCMR 918).

22. It was, therefore, not a case in which decree for specific performance of sale agreement dated 30.12.2012 could be allowed; the judgment and decree for specific performance granted by the learned trial court is set aside and specific performance is declined. It is, however, clarified that the amount of Rs.1,00,00,000/- received through two cheques by vendors Ghulam Hassan and late Shams Ur Rehman in the form of cheques of Rs. 50,00,000/- shall be returned to the plaintiff within 02 months from the date hereof. The amount is directed to be remitted through cheque and/or pay order by Ghulam Hassan and legal heirs of Shams Ur Rehman, appellants, within the stipulated period and in case the respondent fails to receive it the same be deposited in the trial court for payment to respondent. This appeal is accordingly **allowed** in the above terms while RFA No. 74715 of 2019 titled “Ijaz Naseer, etc. v. Ghulam Hassan, etc.” is **dismissed**. Parties shall bear their own costs.

APPROVED FOR REPORTING

JUDGE

JUDGE

ANNOUNCED IN OPEN COURT ON 31-05-2023.

JUDGE