SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Justice Yahya Afridi, CJ
Justice Shakeel Ahmad

Civil Appeal No. 239-L of 2018
(Against the judgment dated 17.10.2018 passed by the Lahore High Court, Lahore in Civil Revision No. 2220 of 2016)

Muhammad Ashraf Anjum

... Appellant (s)

Versus

Sabir Hussain & others

...Respondent(s)

For the Appellant(s) : Mr. Ghulam Hussain Awan, ASC.
Mian Ghulam Hussain, AOR/Absent

For Respondent(s) : Ch. Naseer Ahmed Bhutta, ASC *(via VL from Lahore).*

Date of hearing : 02.07.2025

ORDER

Shakeel Ahmad, J.- This appeal has been preferred against the judgment and decree dated 17.10.2018 passed in Civil Revision No. 2220 of 2016 by the Lahore High Court, Lahore ***("the High Court"),*** whereby and whereunder the concurrent judgments and decrees of the Courts below were set aside. While dismissing the suit of the appellant, he was held entitled to get back the amount of Rs. 700,000/- deposited by him in pursuance of the interim order of the trial Court dated 07.07.2011.

2. The controversy in the present appeal arose from a suit for specific performance of an agreement dated 17.02.2009. As per the contents of the plaint, the respondents (hereinafter referred to as the "**vendors**") had agreed to sell a shop (detail whereof was given in the headnote of the plaint) to the appellant (hereinafter referred to as the "**vendee**") for a total sale consideration of Rs. 800,000/-. It was agreed that the vendee would pay the whole sale consideration till 31.10.2010, whereafter, the sale deed would be executed in his favour. Failing this, the vendee, who was already in possession of the suit shop as a tenant, would deliver back its possession to the

vendors. The vendee claimed that he paid Rs. 200,000/- in two instalments, but the vendors delayed the matter, and eventually refused to execute the sale deed. The suit was decreed by the trial Court on 26.11.2013, subject to deposit of Rs. 800,000/ along with 8% annual interest from 31.10.2010. Dis-satisfied with the same, the respondents went in appeal, which was dismissed vide judgment and decree dated 16.03.2016. Not contented with the judgments and decrees of the two Courts below, the respondents filed a Civil Revision Petition before the High Court, which was allowed vide impugned judgment dated 17.10.2018, thereby the judgments and decrees of the two Courts below were set aside and the suit of the appellant was dismissed. However, he was held entitled to get back the amount of Rs. 700,000/- deposited by him in pursuance of the interim order of the trial Court dated 07.07.2011. Hence, this appeal.

3. Heard both sides and record gone through.

4. On perusal of the record, we are of the view that the instant matter pivots on two fundamental questions: (i) whether the vendee misrepresented material facts in the plaint, and (ii) whether time was the essence of the contract. These questions can be properly appreciated in light of the agreement dated 17.02.2009, the pleadings of the vendee, particularly in Para No.2 of the plaint, and the statement made by him as PW-1.

5. It is an admitted fact that vide the agreement to sell executed on 17.02.2009, the vendors had agreed to sell the suit shop on the terms and conditions mentioned therein. In Para. No. 2 of the plaint, the vendee pleaded as under:

> *"یہ کہ دوکان مذکورپر پر من مدعی بطور کرایہ دار قابض ہے۔ جو کہ مدعی باقاعدگی سے کرایہ ادا کرتا چلا آرہا ہے۔ میعاد مقررہ سے 8 یوم قبل من مدعی ہمراہ گواہان مدعا علیہم کے پاس گیا اور ان کو کہا کہ وہ فرد اراضی پٹواری حلقہ سے لا کر بقایا رقم مبلغ 8 لاکھ روپیہ وصول کر کے دوکان متدعویہ کی رجسٹری بحق مدعی تحریر و تکمیل کروادیوں کیونکہ وہ 1 لاکھ روپے پہلے وصول کر چکے تھے مگر مدعا علیہم کی نیت میں فرق آچکا ہے۔ کیونکہ جائیداد متدعویہ کی قیمت بڑھ چکی ہے۔ جنہوں نے بہانہ سازی شروع کردی کبھی کہتے کہ ان کی والدہ ملتان گئی ہوئی ہے اسکی آمد پر رجسٹری کردینگے پھر کہا کہ کچھ رقم دی جاوے تاکہ پٹواری حلقہ سے فرد اراضی لا سکیں چنانچہ مدعی نے مذید 1 لاکھ روپیہ ادا کردیا"*

The plain reading of the above discloses that the vendee initially paid Rs. 100,000/- to the vendors and then, on their

demand to get a copy of *fard* of the shop in dispute, he further paid Rs. 100,000/- to them. Thus, according to the plaint, Rs. 200,000/- were paid. Contrary to that, when he appeared in the witness box as PW-1, he stated as under:

> "میں *تاریخ* مقررہ سے آٹھ روز قبل مدعا علیہم کے پاس ہمراہ حاجی عنایت، مہر محمد یاسین، حاجی محمد اکرام، نیاز احمد کپڑے والا ان کی دوکان پر گئے۔ میں نے مدعا علیہم سے کہا کہ پیسے لے لو اور دوکان واپس کردو۔ انہوں نے کہا کہ ہماری والدہ ملتان گئی ہوئی ہے جب وہ آئی گی پھر ہم آپ کو رجسٹری کردیں گے انہوں نے کہا کہ ایک لاکھ روپے دے دو کہ ہم نے فرد لانی ہے۔ پھر میں مدعا علیہم کے پاس بار بار جاتا رہا۔ مدعا علیہم ٹال مٹول کرتے رہے پھر میں بازار کے معززین کو ساتھ لے کر گیا پھر میں نے مدعا علیہم کو نوٹس دیا"

6. A comparison of the pleadings and the testimony of the vendee reveals that the amount in question was not paid to the vendors as earnest money. Even the agreement to sell (Ex.P1) is completely silent about any such payment. During cross-examination, it was admitted by the vendee that no earnest money was paid to the vendors, which clearly demonstrates that he had misstated in the plaint about the factum of payment of earnest money. At this juncture, it is relevant to reiterate the settled equitable maxim that "*he who comes into equity must come with clean hands.*" In this regard, the Court, while applying the aforementioned principle laid down in Justice Khurshid's case[1], categorically held that relief cannot be extended to a party who approaches the Court with unclean hands or seeks to secure an unethical or un-merited advantage. The High Court, therefore, correctly observed that the vendee had not come to the Court with clean hands and thus is not entitled to discretionary relief.

7. It is also a matter of record that the agreement to sell specifically fixed 31.10.2010 as the final date for the completion of the transaction. It further provided that in case of default by the vendee, the agreement would stand cancelled. Admittedly, the agreement was executed on 17.02.2009, giving the vendee over twenty months to complete the said transaction by making payment of the entire sale consideration by 31.10.2010. The vendee's failure to perform his obligations within the stipulated time raises the question whether the vendors can validly raise the defence that, since time was the

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[1]Justice Khurshid Anwar Bhinder *v.* Federation of Pakistan (PLD 2010 SC 483)

essence of the contract, the Court cannot decree specific performance in favour of the vendee who failed to fulfil his part of the contract within the agreed timeframe.

8. It is observed that in cases relating to specific performance, equity, which governs the rights of the parties, does not rigidly adhere to the express terms of the contract. Instead, the Court examines the substance of the agreement to ascertain whether the parties intended that performance be completed within a specific time period and whether the parties in substance intended that the completion should take place within a reasonable time.

9. In the present case, prior to the execution of the agreement, its terms were admittedly discussed and read over to both parties. The vendee willingly undertook the burden of obtaining clearance within the time stipulated in the agreement. A bare perusal of the terms of the agreement, which have been discussed earlier in this order, clearly reveals that time was the essence of the contract, and this was understood by both parties, particularly, in view of the fact that the consequences of non-performance of the contractual terms by the vendee were also explicitly set out in the said agreement. Thus, such default on the part of the vendee was fatal to his suit. In this context, reliance can be placed on Fazal-Ur-Rehman's case[2], wherein this Court held that:

> *"Learned counsel for the appellant while arguing to establish that the time was not the essence of the contract relied upon reported judgments in which general principles have laid down that unless it was shown in each case that the time was intended to be the essence of the contract, normally time would not be considered as essence in respect of sale of immovable property, keeping in view the nature of the property and the time.* ***There is no cavil with the correctness of this general proposition of law but we have already observed that it was provided expressly in the agreement in question that payment of the total amount of consideration would be made before 9-6-1991 and in each month an amount of Rs.2 lacs had to be paid before 9-6-1991. It was also settled in the agreement itself by both parties that***

[2] Fazal ur Rehman *v.* Ahmed Saeed Mughal (2004 SCMR 436)

time was intended to be the essence of the contract, and in case of default in the payment of any of the instalment, the earnest money already paid would stand forfeited. In view of these express terms neither it could be argued on behalf of the appellant nor contended that the time was not intended to be the essence of the contract and Court should have decided the case on the general principle that in case of contract of sale of immovable property the time should not be assumed to be essence of the contract"

(Underlining is for emphasis)

10. The present case obviously relates to a contract in commercial transaction and the Court can take judicial notice of the fact that the price of real estate is constantly escalating. The clear intention of the parties, as it appears from the stipulation of the agreement, was to treat time as essence of the contract. Exercise of jurisdiction, under these circumstances in favour of the vendee when character of the property or other circumstances would render such exercise likely to result in injustice, would be against the settled norms of justice.

11. Having regard to the aforesaid principles, the Court cannot attribute a different intention to the parties and cannot specifically enforce the contract at the instance of the vendee, who has failed to perform his part of the obligation within the stipulated time.[3] Both the Courts below failed to consider the above legal and factual aspects of the case, thus arrived at a wrong conclusion, decreeing the suit of the appellant, but the High Court rightly took notice of the same while setting aside the judgments and decrees of the Courts below.

12. For the reasons aforementioned, we find no merit in this appeal; the same is dismissed. There shall be no order as to costs.

Islamabad
02.07.2025
APPROVED FOR REPORTING
Zia/ Rameen, LC*

[3] Mussarat Shaukat All *v.* Sofia Khatoon (1994 SCMR 2189)