

**JUDGMENT SHEET**

**ISLAMABAD HIGH COURT, ISLAMABAD,**  
**JUDICIAL DEPARTMENT**

**RFA No.43/2007**

Ch. Khudadad

*versus*

Mrs. Rehana Nasreen Saqab & 2 others

Appellant by: Mr. Manzoor Hussain, Advocate.

Respondents by: Mr. Muhammad Safdar Janjua, Advocate for  
Respondent No.3  
Respondents No.1 & 2 (ex-parte)

Date of Decision: 13.05.2020.

**MOHSIN AKHTAR KAYANI, J:** Through this RFA, the appellant has assailed judgment and decree dated 10.06.2006, passed by learned Civil Judge 1<sup>st</sup> Class, Islamabad, whereby suit for specific performance filed by the appellant was dismissed due to non-production of evidence in terms of Order XVII Rule 3 CPC.

2. Learned counsel for appellant contends that appellant had entered into agreement dated 23.12.1997 with Respondent No.1 for purchase of Plot No.293, Sector F-11/3, Islamabad, measuring 1000 sq. yards, for a sum of Rs.6,800,000/-, out of which amount of Rs.400,000/- was paid as earnest money, though the non-fulfillment of said agreement rendered the parties to execute another agreement on 16.04.1998, whereafter the appellant paid additional amount of Rs.1,500,000/- towards sale consideration, making total payment of Rs.1,900,000/-; that failure on the part of appellant in fulfilling the terms of contract resulted into a dispute between the parties and later on constrained the appellant to file a suit for specific performance against respondent No.1; that appellant was not given ample opportunities to produce his evidence, however the appellant is not pressing his ground for seeking opportunity to produce his evidence due to recent development of the case, because a house has been constructed over the suit plot followed by its transfer to subsequent vendees on a number of occasions, therefore, the appellant, while relying upon 2017 SCMR 1696

(Muhammad Abdur Rehman Qureshi vs. Sagheer Ahmad), is seeking relief to the extent of return of earnest money of Rs.1,900,000/- along with compensation/additional amount for utilizing the said earnest money for 22 years by respondent No.1.

3. Conversely, learned counsel for CDA/respondent No.3 contends that suit property has already been transferred and appeal of appellant has become infructuous, even no justified reason has been brought on record as to why the appellant has failed to produce his evidence.

4. Similarly, this Court had issued notices to respondents No.1 and 2, but despite notices, even through substituted mode of service i.e. publication in Daily "Pakistan", no one put appearance on behalf of said respondents, therefore, Respondents No.1 and 2 are hereby proceeded ex-parte.

5. Arguments heard, record perused.

6. Perusal of record reveals that the appellant had entered into agreement with Mrs. Rihana Nasreen Saqab (respondent No.1) through agreement dated 23.12.1997 (*hereinafter called the "first agreement"*) regarding purchase of Plot No.293, Sector F-11/3, Islamabad, measuring 1000 sq. yards, (*hereinafter called the "suit plot"*) against sale consideration of Rs.6,800,000/-, whereby an amount of Rs.400,000/- was paid as earnest money. The first agreement was extended by the parties by executing another agreement on 16.04.1998 (*hereinafter called the "second agreement"*) after payment of Rs.1,500,000/- by the appellant, as such Respondent No.1 received total amount of Rs.1,900,000/-. The appellant was given time for payment of balance sale consideration of Rs.4,900,000/- till 31.05.1998 through pay orders, but same was not paid. As a result whereof, the appellant filed a civil suit for specific performance of agreement, which was contested by respondents No.1 and 2 as well as by the CDA/respondent No.3, whereby the agreements together with payment of Rs.1,900,000/- were

acknowledged by the respondents in their written statement, however breach of contract has been alleged to the appellant.

7. After framing of issues on 07.02.2000, the suit was fixed for recording of evidence of appellant and approximately 16-17 opportunities were granted to the appellant, which has also been referred in the impugned judgment, and even cost of Rs.1,000/- was also imposed upon the appellant, but the appellant has failed to produce his evidence. Evidently, the contemptuous delay is apparent on record on the part of appellant as he had willfully not produced the evidence, rather intended to delay the matter, even he himself not appeared before the Court nor produced his evidence despite imposition of cost of Rs.1000/-, whereafter the learned Trial Court has rightly applied provisions of Order XVII Rule 3 CPC and as such, no ground has been substantiated by the appellant to allow his appeal on this count. Reliance is placed upon 2015 SCMR 1401 (Rana Tanveer Khan vs. Naseer-ud-Din).

8. The appellant further contends that after dismissal of his suit and during pendency of instant appeal, house was constructed over the suit plot by Respondent No.1 and same was transferred to subsequent vendees twice, who are not parties to this appeal, which has been confirmed by learned counsel for CDA present before the Court. However, the appellant on the other hand also contends that he will not press this appeal if his payment of Rs.1,900,000/- is returned along with compensation for using the said amount by Respondent No.1 for 22 long years.

9. Keeping in view the request and chain of circumstances, we have attended to the written statement as well as record and observed that there is no denial that amount of Rs.1,900,000/- was received by respondent No.1, however the second agreement refers a clause regarding the settlement of amount and claim, which is as under:

*"That the time is the essence of the agreement and if the 2<sup>nd</sup> party failed to arrange the balance sale consideration then the agreement shall be considered as cancelled and the 1<sup>st</sup> party is entitled to forfeit the sum of*

*Rs.4,00,000.00 (Rupees four lacs only) from the above said received earnest money. In case of forfeiture and cancellation of the above said agreement for non payment of balance amount on 31<sup>st</sup> May, 1998, the 1<sup>st</sup> party is liable to pay back the remaining amount of Rs.15,00,000.00 (Rupees fifteen lacs only) to the 2<sup>nd</sup> party through pay order. No other mode of payment shall be considered as payment."*

10. The above referred aspect has clearly been demonstrated in Para-4 of the written statements submitted by respondents No.1 and 2. The earnest money was paid through pay order, which is also available on record and as such, the payment of Rs.1,900,000/- in favour of respondent No.1 is verified from the record, however by the terms of agreement the appellant is entitled to receive back the amount of Rs.1,500,000/- i.e. the amount after deduction of earnest money of Rs.400,000/- from the total amount of Rs.1,900,000/-.

11. We have gone through the provisions of Section 55 of the Contract Act, 1872 and as such, the failure on the part of appellant is visible to perform the terms of contract within stipulated time, although time is not the essence of contract as the same was extended in the second agreement, therefore, in this eventuality, regarding the return of Rs.1,500,000/- under the terms of contract the principle of equity comes into play. Even otherwise, Section 22 of the Specific Relief Act, 1877 gives a discretion to the Court to grant a decree for specific performance and Court is not bound to grant such relief merely because it is lawful to do so. However, the discretion could only be exercised on sound and reasonably judicial principles. Similarly, provision of Section 19 of the Specific Relief Act, 1877 deals with power to award compensation in certain cases, which is as under:

**19. Power to award compensation in certain cases.-** Any person suing for specific performance of a contract may also ask for compensation for its breach, either in addition to, or substitution for, such performance.

*If in any such suit, the Court decides that specific performance ought not be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.*

*If in any such suit the Court decides that specific performance ought to be granted but, that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.*

*Compensation awarded under this section may be assessed in such manner as the Court may direct.*

12. Keeping in view the above position and principle of law, while exercising discretionary jurisdiction for grant of refusal of relief of specific performance, the appellant is entitled for return of Rs.1,500,000/-, which remained under the use of respondent No.1 for 22 long years, during which period the property in dispute has multiplied exponentially and even, if said amount was deposited with the Bank, certain profit would have been earned. Similarly, depreciation of value of money and inflation are also key factors to be considered at this stage.

13. In view of above backdrop, we have considered the entire proposition on the touchstone of cases reported as 2017 SCMR 1696 (Muhammad Abdur Rehman Qureshi vs. Sagheer Ahmad), PLD 2014 SC 506 (Liaqat Ali Khan vs. Falak Sher) and 2019 SCMR 524 (Sheikh Akhtar Aziz vs. Mst. Shabnum Begum).

14. In view of above, the instant regular first appeal is hereby DISMISSED being meritless. However, Respondent No.1 is directed to return the amount of Rs.1,500,000/- to the appellant along with mark-up at the bank rate calculated from the date when it was paid till it is fully recovered as compensation.

(LUBNA SALEEM PERVEZ)  
JUDGE

(MOHSIN AKHTAR KAYANI)  
JUDGE

Khalid Z.