

## **JUDGMENT SHEET**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT.**

**RFA No. 53/2013**

Mrs. Nusrat Kausar Gillani

Versus

Aftab Ahmed Khan and another

APPELLANT BY: Syed Pervez Zahoor, Abdul Waheed Siddiqui and  
Dr. Salah-ud-Din Mengal Advocates.

RESPONDENT No.1 BY: Mr. Mudassar Hussain Malik, Advocate.

DATE OF HEARING: 24-02-2016

**MOHSIN AKHTAR KAYANI, J.** Through this Regular First Appeal, appellant has challenged the judgment and decree dated 08.02.2013, passed by the Civil Judge, 1<sup>st</sup> Class (West), Islamabad whereby the suit for specific performance of agreement and permanent injunction filed by Respondent No. 1 was decreed by the Court.

2. Brief facts narrated in appeal are that Respondent No.1 filed suit for Specific performance of agreement dated 23.07.2003 against the present appellant before the Civil Court at Islamabad wherein Respondent No.1 claimed that he entered into agreement to sell regarding House No. 251, Street No. 33, G-10/1, Islamabad on 23.07.2003 against the total Sale Consideration of Rs.4,400,000/- out of which Rs. 1,000,000/- was paid through Pay Order and Rs.500,000/- was paid in cash, the remaining amount of Rs.2,900,000/- was to be paid within two months from the date of agreement and the house in question was to be transferred in the office of CDA (Respondent No. 2). It was also mentioned by Respondent No.1 in the plaint that original allotment letter was handed over by the appellant to respondent No.1 at the time of execution of agreement to sell.

3. As per contents of the plaint Respondent No. 1/plaintiff further claimed that he approached the appellant within the stipulated period of two

months for the transfer of house and for necessary completion of formalities but the appellant has not visited the office of CDA rather Respondent No. 1 himself approached the office of CDA (Respondent No. 2) and get issued the application for transfer of allotment of the suit house on 22.10.2003. Respondent No. 1 further claimed that number of request were made to the appellant for the transfer of suit property in the office of CDA but the appellant delayed the matter on one pretext or the other. Although, it was informed that the said transfer application is valid till 21.01.2004 but the appellant made excuses for non-availability. Finally, Respondent No. 1 came to know that appellant is trying to sell the suit house to someone else on higher price. Finally the suit was decreed vide judgment decree dated 08.02.2013 by Civil Judge (West), Islamabad.

4. Learned Counsel for the appellant argued that Respondent No. 1 had badly failed to pay the balance Sale Consideration of agreement to sell dated 23.07.2003 amounting to Rs.2,900,000/- whereas time was the essence of contract under Clause-2 of the agreement (Ex.P1). Respondent No. 1 badly failed to arrange the balance Sale Consideration of Rs.2,900,000/-, hence, agreement was cancelled and the amount was forfeited. Learned Counsel for the appellant further contends that Respondent No.1 has not issued any notice for the payment of balance Sale Consideration rather there are only oral assertions that he approached the appellant for execution of transfer application. It has further been argued that according to Clause-4 of the agreement (Ex.P1) if the seller failed to transfer the suit house in favour of purchaser or withdraws from the said deal he would be responsible to pay the double amount of the received earnest money to the purchaser and even today the said Clause holds the field. Learned Counsel for the appellant further argued that Aftab Ahmad Khan (PW-1) admits in his evidence that balance Sale Consideration of Rs. 2,900,000/- was payable within two months and Respondent No.1 on the request of appellant got issued the

transfer application form from CDA dated 22.10.2003 which was valid up to 21.01.2004. This shows that plot was transferable and the application for transfer was issued but Respondent No.1 failed to pay the balance Sale Consideration between the said period which resulted into termination of the said contract as time is the essence of contract in such situation. Learned Counsel for the appellant further argued that Gulistan Khan (PW-2) who is also witness of the agreement (Ex.P1) states that said house is transferable within the period of two months and the amount was to be paid within the two months from the date of agreement. Said PW-2 also admitted in cross-examination by using word "**we**" against every question which was read in juxtaposition with the testimony of appellant where she asserted that original deal was in fact made with Gulistan Khan (PW-2) and it is not Aftab Ahmad (PW-1) the front man of the deal. Learned Counsel for appellant further states that Trial Court has erred while passing the impugned judgment & decree as Respondent No.1 failed to show his bonafide willingness to pay the balance Sale Consideration within the stipulated period nor ever issued any letter, legal notice to that effect, hence, it can safely be presumed that Respondent No.1 had no intention to pay the balance Sale Consideration of Rs.2,900,000/- for which he had not prepared any draft, cheque in the name of appellant and even otherwise he had not requested the Learned Trial Court for the deposit of the balance Sale Consideration and if he had done so at the time of filing of the suit the matter might be fructified at that time, hence, Respondent No. 1 is not entitled for discretionary relief under Specific Relief Act, 1877. Learned Counsel for the appellant further argued that PW-1/ Plaintiff/Respondent No.1 admits the fact in the cross-examination that he was ready to receive back the double amount of the earnest money i.e. Rs.15,00,000/-, hence the suit was not maintainable and the learned Trial Court ignored such a qualified admission which resulted into cancellation of entire deal of Ex.P1. In last, learned Counsel for the appellant states that

they have suffered a huge financial loss due to non compliance of terms of agreement (Ex.P1) and if Respondent No. 1 had paid the amount of balance Sale Consideration of Rs. 29,00,000/- within the stipulated period, the appellant could finalize his agreement to sell dated 02.06.2003 called as Ex.D1 (regarding purchase of another property i.e., House No.185, Street No.61, Sector I-8/3, Islamabad) whereas, the appellant could not pay the balance sale consideration to her seller within stipulated period, hence, she suffered a huge loss and her earnest money was forfeited.

5. Conversely, learned Counsel for Respondent No. 1 argued that the agreement to sell (Ex.P1) was admitted document even the earnest money was admitted on record, execution of agreement to sell Ex.P1 and original allotment letter of the suit house as Ex.P2 were produced in evidence which show due execution of the agreement, however, appellant failed to transfer suit property in the name of Plaintiff/Respondent No.1. Learned Counsel for Respondent No. 1 further states that the requirement to prove the contents and the execution of Ex.P1 were duly complied with. Even otherwise, the agreement was not disputed and the only question involved relates to the proposition that **whether time is the essence of contract or not?** He further argued that Respondent No.1 has deposited the balance Sale Consideration by virtue of impugned judgment and decree dated 08.02.2013 in Court. Learned Counsel for Respondent No.1 further argued that the learned Trial Court has not directed Respondent No.1 to deposit the balance Sale Consideration in Court account, hence they are entitled for decree for Specific Performance which was rightly granted by the learned Trial Court as the transfer application form was got issued by Respondent No.1 from the office of CDA (Respondent No. 2) which had the validity upto 21.01.2004 but the appellant intentionally failed to appear in the office of CDA in order to cause loss to Respondent No.1.

6. Arguments heard, record perused.
7. From the perusal of record it has been transpired that agreement to sell dated 23.07.2003 (Ex.P1) was admitted between the parties, receiving of amount of Rs.15,00,000/- (Rs. 10,00,000/- through Pay Order No. A064720 dated 23.07.2003 drawn at ABL, G-10 Markaz, Islamabad) and Rs.500,000/- was acknowledged in para 1 of the agreement. It was also admitted between the parties that amount of Rs. 29,00,000/- was to be paid as balance Sale Consideration in terms of Clause-2 of the Ex.P1.
8. In order to understand the question involved in the present Regular First Appeal, Clause-2 of Ex.P1 is reproduced below:-

*"That the purchaser shall be responsible to pay balance amount of sale consideration a sum of Rs.29,00,000/- (Rupees twenty nine lacs only) within two months from the signing date of this agreement, with fifteen days from the signing date of this agreement, at the time of transfer of the said house in his favor or in the favor of his nominee(s)."*

9. Hence, the Trial Court on the basis of divergent pleadings of the parties framed the following issues vide order dated 18.05.2011 are reproduced as follows:-

1. Whether the plaintiff is entitled to get a decree for specific performance of agreement to sell dated 23.07.2003 against the defendants in respect of suit property? OPP
2. If the above issue No. 1 is proved in affirmative, then whether the plaintiff is entitled to get a decree for permanent and mandatory injunction as prayed for? OPP
3. Whether the plaintiff has no cause of action and locus standi to file the present suit and the suit of the plaintiff is liable to be dismissed U/O 7 Rule 11 CPC? OPD
4. Whether the plaintiff has not come to the court with clean hands OPD
5. Whether the plaintiff is estopped by his words and conduct to file the present suit? OPD
6. Whether the suit of the plaintiff is barred by law? OPD

7. Whether the suit is false, frivolous and vexatious, hence liable to be dismissed with special costs? OPD

8. Relief.

10. The learned Trial Court has given the findings only on issue No. 1 in order to resolve the controversy, rest of the issues were referred to the defendants and no evidence was allegedly produced regarding the said issues, therefore, in order to dilute the entire controversy, we are of the opinion that issues No. 1 to 6 should be discussed collectively and findings on these issues be also given after putting the issues in juxtaposition.

**FINDINGS ON ISSUES NO. 1 to 6**

11. As per Clause-4 of Ex.P1 (agreement to sell dated 23-07-2003), it is admitted between the parties that amount of Rs. 29,00,000/- as balance Sale Consideration was to be paid within two months from the date of execution of the agreement (Ex.P1). However, Respondent No.1 never issued any notice to the appellant that he was ready to comply with the said term, the interpretation of the said Clause has to be seen with reference to evidence recorded by PW-1 &2 whereupon the PW-1 in his examination in chief states that the amount of Rs. 29,00,000/- is payable within two months to Respondent No. 1, when she transferred said house in the office of CDA in favour of Respondent No. 1 and for the said purpose he has to get issued the transfer application on 22.10.2013, which was valid upto 21.01.2004. Although the same was not reflected in the agreement to sell dated 23.04.2003 (Ex.P1) as it was not the obligation of Respondent No. 1 to do the act, by managing issuance of transfer application, he admits the obligation of Clause-4 (Ex.P1) in which balance Sale Consideration was payable within the period of two months from the date of agreement i.e. 23.07.2003 whereas the transfer application form was issued on 22.10.2003, hence it is safely assumed that the period of two months was already elapsed and even thirty (30) days time after the said

period was also consumed in the fulfillment of said obligation, however, there is no evidence produced by Respondent No.1, through which he can prove that any effort was ever made by him to show his readiness to pay the balance Sale Consideration to the appellant.

12. From the perusal of written statement and the evidence of the appellant a question of balance Sale Consideration was specifically raised by the appellant in para 5 stating therein that balance Sale Consideration was not paid in the stipulated period of two months. Even otherwise, the appellant had handed over the original allotment letter dated 23.04.1998 (Ex.P2) to Respondent No. 1 at the time of execution of Ex.P1 which shows that she was willing to perform her part of contract. When the said fact is read together with the issuance of transfer application form on 22.10.2003 admitted by Respondent No. 1/PW-1 in his examination in chief, these facts jointly give rise to a chain of evidence against Respondent No. 1 that he has not put his efforts to pay the balance Sale Consideration within the stipulated period of two months.

13. The controversial question in the entire suit is as to whether the **"time is the essence of contract or not?"** Normally time is not the essence of contract as certain obligations have to be performed before the application of time clause which were imposed through the agreement upon the seller/vendor, who was responsible to provide all such documents, material and requirements for the completion of sale by means of transfer before the transferring authority i.e. CDA (in the present case).

14. If the obligations upon the seller/appellant were not adhered to, the time does not start ticking but in present case:-

- i. *Original allotment letter of the suit property (Ex.P2) was handed over to the Respondent No.1.*
- ii. *Application for transfer for suit property was got issued on 22.10.2003 as claimed by Respondent No. 1 /PW-1 Aftab Ahmad Khan.*

- iii. *No notice was ever issued by Respondent No. 1 to the appellant asking for the completion of transfer procedure in the office of CDA.*
- iv. *No document was ever produced before the Trial Court in order to show the balance Sale Consideration readiness to pay by means of Bank Draft, Cross Cheque or Bank Statement.*
- v. *Respondent No. 1 has not put any effort by submitting any application before the Trial Court for the deposit of Sale Consideration ever from filing of suit i.e., 01-11-2004 to 08-02-2013 end of trial.*

15. From the appreciation of above facts it is clear that if the time is essence of contract i.e. issuance of application for transfer form issued by the CDA (Respondent No. 2) which was admitted by the PW-1 in his examination in chief and at the same time Ex.P2 original allotment letter was with Respondent No. 1 who had produced the same before the Trial Court, which shows that respondent No.1 had the full authority to get the property transferred only by asking the appellant for her appearance before the Admitting Officer, CDA. When the requirements of the transfer were completed, the time which is the essence, starts ticking on the clock, even PW-1 has never placed any copy of pay order through which he can justify that appellant ever refused to transfer the suit property neither any Challan or pay order regarding transfer fee has been prepared, which was the responsibility of Respondent No.1 in terms of Clause-6 of Ex.P1. In order to understand the true meaning of term **"time is the essence of contract"**. The words used in clause 2 of Ex.P1 agreement has to be understood especially "**responsible to pay**", "**within**" and "**from**" which show the duty of purchaser/respondent No.1 Aftab Ahmad Khan to pay the balance sale consideration of Rs.2,900,000/- within two months from signing of this agreement Ex.P1, the direct meaning conveyed from the said sentence clearly puts heavy onus upon respondent No.1 to pay the amount thereafter any other part has to be performed but respondent No.1 failed to do so.



16. Clause No.2 of Ex.P1 refers two different time lines firstly within 02 months, secondly with fifteen days from the signing date of this agreement, which shows the ambiguity regarding time clause, therefore, we are of the opinion that 2 months time from the date of agreement i.e., 23-07-2003 is the correct interpretation of said clause. Even otherwise the due balance payments are always received by the seller before transfer of the property in accordance with prevailing marketing practices rather sellers do not record their statements for transfer before transferring authority prior to receiving of balance sale consideration.

17. From above, it is manifestly clear that words "**within**" and "**from**" are indicative of the fact that time was indeed the essence being outer limit of time in which payment was to be made. Reliance is placed on **2015 SCMR 828, "Adil Tiwana and others versus Shaukat Ullah Bangash"**.

*"Failure of plaintiff to pay balance consideration before agreed time---Effect---Wording of the agreement to sell showed that a specific date for making payment of the balance (consideration) was mentioned, which date was the absolute limit---Said specific date was indeed the essence being the outer limit of time within which payment was to be made."*

From the perusal of evidence following admitted facts comes on record:-

- (a) Agreement Ex.P1 executed on 23-07-2003 regarding House No.251, St.No.33, measuring 30x60, Sector G-10/1, Islamabad owned by appellant.
- (b) Total sale consideration of the suit house was fixed at Rs.4,400,000/-, earnest money was paid by respondent No.1 Rs.1,500,000/- balance payable by respondent No.1 is Rs.2,900,000/-.
- (c) Time for balance payment was 2 months from 23-07-2003.
- (d) Original allotment letter Ex.P2 dated 23 April 1998 was given by appellant to respondent No.1 at the time of execution of agreement to sell Ex.P1.
- (e) Transfer application form was issued from the office of CDA on 22-10-2003 which was valid upto 21-01-2004 (admitted by respondent No.1).
- (f) No written notice was ever issued by both the parties for performance of their part of contract.
- (g) No proof of readiness of payment of balance sale consideration of Rs.2,900,000/- was prepared by respondent No.1 or any proof that respondent No.1 has the balance sale consideration with him has not been placed on record.

- (h) *Respondent No.1 admits that if appellant is not willing to transfer the house in his name then appellant had to pay the double amount of earnest money.*
- (i) *Respondent No.1 failed to place his bank statement on record for the year 2003.*
- (j) *Respondent No.1 was responsible to pay balance sale consideration of Rs.2,900,000/- within 2 months of Ex.P1.*
- (k) *Suit was filed by respondent No.1 on 01-11-2004 wherein last date of submission of transfer application form was 22-01-2004.*
- (l) *PW-2 respondent No.1 brother who was property dealer admits that sale consideration was to be paid by respondent No.1 to appellant within 02 months.*
- (m) *No male member of family of appellant was present at the time of agreement to sell only respondent No.1, PW-2, PW-3 were present with appellant.*
- (n) *Suit was filed only due to increase in prices manifolds during the said period.*

18. From the above mentioned facts brought on record learned Trial Court has wrongly decided the main issue No.1 vide his findings in para Nos. 12 to 15, whereby, Trial Court has observed in the judgment that clause No.2 of Ex.P1 is very ambiguous regarding time of 02 months or 15 days but has given no findings to that extent even no reason has been mentioned in the impugned judgment, the entire findings are in para No.14 which is reproduced as under:-

*"14. The defendant No.1 has admitted the execution of the agreement and she has also admitted in cross examination that she received Rs.10,00,000/- through pay order and Rs.500,000/- in cash from the plaintiff and the plaintiff is ready to pay the remaining sale consideration to the defendant No.1."*

Hence the Trial Court erred while giving above mentioned findings without considering the evidence available on record. Moreover, the plaintiff/respondent No.1 when appeared as PW-1 and admitted the fact in the following words:-

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Which clearly demonstrate that time is the essence of contract and wherein period fixed between the parties was of two months in terms of clause 2 of Ex.P1, even the other witness PW-2 who is brother of PW-1 also admits:-

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19. Hence, it is admitted by plaintiff/respondent No.1 and his only witness in clear terms that time for payment was fixed within 2 months from 23-07-2003, the final time for payment was concluded as 23-09-2003 whereas, the application for transfer was got issued on 22-10-2003 as evident from PW-1 testimony but no effort was made for further completion of terms. Even the suit was filed on 01-11-2004 almost after one year and two months of the date fixed for the balance sale consideration which shows the unfair conduct of respondent No.1. It is admitted by respondent No.1 in his evidence to receive back the double of the earnest money in following words:-

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This shows the unwillingness of respondent No.1 towards performance of agreement Ex.P1 rather he was interested to claim double the amount of earnest money, hence reliance is placed on:-

**2010 SCMR 286** Muhammad Hussain & others versus Dr. Zahoor Alam.

*“There are various parameters presented by Hon’ble Supreme Court in various pronouncements to refuse to exercise equitable discretionary relief in favour of the appellant on the following well known maxims”*

- (i) He who seeks equity must come with clean hands.*
- (ii) Law favors who are vigilant qua their rights.*
- (iii) The purpose of exercising the discretionary jurisdiction is to see the Justice is rendered according to the rules of equity and good conscience.*

*Matters for consideration for the exercise of discretion are: bad faith, dishonesty, unreasonableness of the decision and constitutional remedies being extraordinary, no one is entitled*

*to claim as of right exercise of discretionary power.  
"Haji Saifullah Khan's case PLD 1989 SC 166".*

20. We are of the considered opinion that respondent No.1 failed to perform the agreement in accordance with its terms, especially to arrange payment of balance sale consideration which is evident from entire evidence, hence, the findings on Issue No. 1 have been reversed and respondent No. 1 has no cause of action to file the suit for Specific Performance as he has been estopped by his words and conduct. Even he is not entitled for discretionary relief of Specific Performance on the ground that he has not come to the Court with clean hands, therefore, Issues No. 3 to 6 have been proved against respondent No. 1, in view of above, this appeal is allowed. Judgment and decree dated 08.02.2013 are hereby set-aside.

We have observed following reasons which are the key features in decision of any suit for specific performance to be made basis:-

- (a) Plaintiff/purchaser had to prove his readiness to pay Balance Sale Consideration on record by means of deposit of balance amount in Court at the earliest i.e. at the time of filing of suit (if not paid earlier).
- (b) All actions & efforts to pay balance sale consideration must be seen on record, even time is the essence or not or conditional with any other clause, obligation or terms of agreement. Reliance is placed on 1999 SCMR 1362, 2015 SCMR 828 and 2015 SCMR 21.
- (c) If the Balance Sale Consideration has been paid on record at the time of filing of the suit by the plaintiff at his own, his conduct should be treated as bonafide, prompt, fair, confirming his readiness which entitles him for equitable relief of Specific Performance, even at the stage of decision of the application U/O 39, Rule 1&2 CPC.

21. If respondent No.1 pays the balance amount within the period as agreed or deposited in Court at the time of filing of suit the matter would be settled there and then but he was not interested to perform his part of contract, hence, appeal is hereby accepted, the judgment & decree dated 08-02-2013 is set-aside, suit of the plaintiff is dismissed. However, the amount of earnest money of Rs.1,500,000/- which was received by the appellant and same was also acknowledged and admitted, shall be returned

to respondent No.1 with double rate in terms of clause-4 of Ex.P1. Appellant is directed to deposit the amount of Rs. 30,00,000/- in the Trial Court within one month. Reliance is placed upon **2015 SCMR 21, Muhammad Iqbal**

**V.s Mehboob Alam.**

*"use of the money for such long period the respondent obviously stands enriched; the currency has devalued while the value of the suit property has considerably increased. If the said amount was not withdrawn and was invested by the Court in some profit bearing scheme of the Government, the amount would have been doubled by now,"*

**(MOHSIN AKHTAR KAYANI) (SHAUKAT AZIZ SADDIQUI)**  
**JUDGE JUDGE**

Announced in open Court on \_\_\_\_\_.

**JUDGE**

**JUDGE**

Ramzan

**Approved for reporting.**

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