JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Civil Revision No. 493/2015

Saeed Ullah Khan
Versus
Muhammad Khalid & another

Petitioner by:	Mr. Saeed Khurshid Ahmed and Mr. Muhammad Anwar Bhawar, Advocates.
Respondent No.1 by:	Mr. Muhammad Nazir Jawwad, Advocate.
Date of Hearing:	03.11.2017.

MOHSIN AKHTAR KAYANI, J:- Through this Civil Revision the petitioner has assailed the concurrent findings of the Courts below, whereby the learned Civil Judge (West) Islamabad decreed the suit vide judgment and decree dated 31.03.2015 and the learned first Appellate Court upheld the same vide judgment and decree dated 17.09.2015 passed by learned ADJ-IV (West), Islamabad.

2. Brief facts referred in the instant case are that the Federal Government Employees Housing Foundation/respondent No.2, vide petitioner's application No.055892, issued him a provisional allotment letter of a Category-IV Plot, i.e. Plot No.26 measuring 200 square yards, Street No.34, Sector G-14/1, Islamabad (hereinafter "***suit plot***"). Petitioner being a provisional allottee of the suit plot entered into agreement to sell dated 26.12.2004 with Muhammad Khalid/respondent No.1 against total sale consideration of Rs.536,000/- and received Rs.100,000/- as earnest money at the time of execution of the agreement to sell and it was also agreed between the parties that all the due installments and development charges of the subject plot would be paid by respondent No.1 in the FGEHF. Respondent No.1 claimed in his plaint that he has deposited all the due

amount of installments including the amount of Rs.100,000/- through pay order No.0781593 dated 06.11.2006 in the office of respondent No.2 as cost of the land of the suit plot and agreed that he is ready to pay the balance sale consideration/amount of the suit plot i.e. Rs.436,000/- to petitioner at the time of transfer of the suit plot but petitioner is not acknowledging the rights. As result whereof, respondent No.1 filed a suit for specific performance of agreement dated 26.12.2004, the same was contested by present petitioner through his written statement wherein he has acknowledged the execution of agreement to sell dated 26.12.2004, however he has taken a stance that the agreement was cancelled due to non compliance of terms agreed therein and he himself paid the installments. The learned Civil Court framed issues and after recording the evidence of present petitioner as DW-1 and respondent No.1 along with his witnesses as PW-1 to PW-5, passed the judgment and decree dated 31.03.2015 in favour of respondent No.1. Whereafter, petitioner filed a Regular First Appeal which was also dismissed by the learned Additional District Judge vide judgment and decree dated 17.09.2015. Hence, instant Civil Revision.

3. Learned counsel for petitioner contends that both the Courts below have not appreciated the evidence in its true perspective and even the alleged breach of terms has not been determined in accordance with the evidence; that respondent No.1 has not complied with the terms as he was warned through a legal notice dated 20.03.2006 (Exh.D2/1) to deposit the installments as per the terms of agreement and finally the agreement to sell was cancelled through a legal notice (Exh.D4/1) dated 03.05.2006; that as per the provisional offer of allotment dated 27.01.2006 (Exh.D3), the seven (07) installments of the cost of land/price of land were to be paid within 25 months but respondent No.1 has not paid the due amount of the installments, even the amount of Rs.180,000/- was deposited through pay

order by respondent No.1 in the FGEHF on 23.11.2006 (Exh.P8) which clearly demonstrates that the agreement was not complied with in letter and spirit. The receipt of payment of Rs.180,000/- deposited through pay order Exh.P8 has been referred as Exh.P5. Learned counsel for petitioner further contends that affect of breach of terms in the light of said apparent violation by respondent No.1 has been ignored by both the Courts below, hence the same amounts to illegality which could not be given as beneficial to respondent No.1 in case of discretionary relief under Specific Relief Act, 1877 and that the Courts below failed to appreciate the law referred in Section 12, 19, 21, 22 & 24 of the Specific Relief Act, 1877 read with Section 23 & 25 of the Contract Act, 1872. At last, learned counsel for petitioner contends that the first Appellate Court has just passed the impugned judgment and decree dated 17.09.2015 without discussing the evidence and even no reason has been referred in Para-6 of the impugned judgment and the same has been passed in violation of Order XX Rule 5 CPC, even issue wise findings have not been given and the impugned judgment was passed in a haste.

4. Conversely, learned counsel for respondent No.1 contends that the execution of agreement to sell dated 26.12.2004 (Exh.P1) was not denied and petitioner has acknowledged his signature together with the earnest money and respondent No.1 has deposited the balance sale consideration of Rs.436,000/- through Exh.P7 in the Court's account on 11.07.2011 along with the cost of the land and installments through Exh.P8 and Exh.P5 in the account of FGEHF. Learned counsel for respondent No.1 further contends that Rs.36,000/- as seed money was also deposited by respondent No.1 through Exh.P4 on 19.02.2004 and both the Courts below have rightly passed the concurrent findings in favour of respondent No.1.

5. Arguments heard, record perused.

6. From the perusal of record it has been observed that respondent No.2 issued a provisional allotment letter of a Category-IV Plot, measuring 200 square yards, Street No.34, Sector G-14/1, Islamabad to petitioner against his application No.055892 subject to payment of schedule of cost of land of Rs.470,000/- to be paid in seven (07) installments (Exh.D3). Respondent No.1 entered into agreement to sell with petitioner vide agreement to sell dated 26.11.2004 (Exh.D1) prior to the offer of allotment against total sale consideration of Rs.536,000/- wherein it was referred that petitioner is not in a position to deposit the price of land and offered respondent No.1 to deposit the same in FGEHF, whereupon respondent No.1 accepted the offer and settled their terms to sell the plot against the profit of Rs.750,000/- and only received Rs.100,000/- as earnest money out of which Rs.25,000/- had already been received on 11.12.2003 and Rs.75,000 as cash. It was further agreed in the agreement to sell that respondent No.1 is responsible to pay the remaining sale consideration as well as profit within prescribed time and have to deposit the cost of land in the office of FGEHF as the suit plot was not transferrable at that time. Petitioner had executed affidavit (Exh.P2) and undertaking (Exh.P3) acknowledging the rights, terms and conditions agreed upon.

7. Respondent No.1, on 06.12.2006, filed a suit for specific performance of agreement to sell against the petitioner with a claim that he has deposited Rs.180,000/- through pay order (Exh.P8) dated 06.11.2006 in the account of FGEHF (Exh.P5) and is ready to pay the balance sale consideration of Rs.470,000/- but the petitioner is not complying with the terms. Whereas, petitioner by filing written statement took the stance that respondent No.1 has failed to comply with the terms of agreement and accordingly a legal notice dated 20.03.2006 (Exh.D2/1) was issued through registered post (Exh.D2/2), wherein respondent No.1 was directed to revise the agreement

and pay new cost of land i.e. Rs.470,000/- as FGEHF/respondent No.2 has issued a letter for the deposit of first installment, which was later on deposited by petitioner. However, petitioner through registered post (Exh.D4/2) issued another legal notice dated 03.05.2006 (Exh.D4/1) for cancellation of agreement, on the ground that respondent No.1 was already given warning to deposit the installment but he failed to deposit it, hence the terms of agreement were violated. Both the legal notices were not replied by respondent No.1, however respondent No.1, before filing the suit, deposited Rs.180,000/- in lump sum on 06.11.2006 through Exh.P8 in the account of Respondent No.2 through Exh.P5.

8. In essence, respondent No.1/Muhammad Khalid while appearing as PW-1 acknowledged the following factors regarding the terms of agreement in his cross-examination.

- یہ درست ہے کہ معاہدہ میں یہ بات تحریر ہوئی تھی کہ پلاٹ کی جملہ قیمت و دیگر اخراجات بحق مدعاعلیہ نمبر2 میں نے ادا کرنے تھے۔ یہ دو درست ہے کہ یہ بات طے ھوئی تھی کہ جملہ اخرابات بابت خرید پلاٹ وترقیاتی کام میں نے ادا کرنے تھے۔
- یہ درست ہے کہ Ex.PA رسید ادائیگی میں درج رقم مبلغ-/36,000 روپے میں نے مدعاعلیہ نمبر 2 کے پاس جمع کروائی تھی۔ مورخہ 11/9/2011 کو جمع کروائی تھی۔ ExP4 پر جمع کنندہ شخص کے دستخط میرے نہ ھیں۔ دوران تقابل ExP4 مدعی مقدمہ نے تسلیم کیا کہ اس پر جمع کنندہ شخص کے دستخط سعید اللہ کے ھیں۔
- ExD2 پر میرے دستخط نہ ھیں۔
- میں نے ExD3 کو کبھی نہ پڑھا تھا کیونکہ مدعاعلیہ نمبر 1 کے پاس تھا اس نے میرے حوالے نہ کیا تھا۔
- مدعاعلیہ نمبر 1 نے مجھے یہ بھی نہ بتایا تھا کہ پلاٹ متدعویہ کی قیمت-/470,000 روپے کردی گئی ہے۔ یہ بھی نہ بتایا تھا کہ چھٹی ExD3 کے ساتھ پلاٹ کی قیمت کے تعین کے متعلق ExD3/1 "Schedule Payment" منسلک تھا۔
- یہ درست ھیکہ ExP5 کے تحت جمع ھونے والی رقم مبلغ -/180,000 روپے میں نے بذریعہ "Pay Order" مورخہ 6/11/2006 کو جمع کروائی تھی۔
- یہ درست ھیکہ مدعاعلیہ نمبر 2 کی جانب سے پلاٹ کی رقم کی ادائیگی کے تقاضہ کے بعد اگر رقم جمع نہ کرائی جاتی تو پلاٹ منسوخ ھو جاتا۔ میں نے مدعاعلیہ نمبر 2 کے پاس جاکر کبھی بھی یہ معلوم کرنے کی کوشش نہ کی تھی کہ سوسائٹی میں پلاٹ کی رقم کب اور کسطرح ادا کی جانی ھے۔ یہ درست ھیکہ آج تک میں نے اس

بات کا پتہ نہ کیا ھے کہ میری طرف سے پلاٹ کی قیمت کی مد میں جمع کی جانے والی رقم مبلغ 180,000/- بمطابق ExP5 کیش کروایا ھے یا نہ کروایا ھے۔

The above referred stance of respondent No.1 confirms that the terms agreed between the parties regarding deposit of cost of the land as well as development charges claimed by FGEHF is the responsibility of respondent No.1, whereas respondent No.1 neither visited the office of FGEHF nor even confirmed about the due amount or the installments. Whereas, FGEHF increased the cost of land from Rs.250,000/- to Rs.470,000/-, whereupon petitioner dispatched a legal notice (Exh.D2/1) dated 20.03.2006 to respondent No.1 vide postal receipt No.1439 (Exh.D2/2) which was not answered by respondent No.1, regardless of the fact that the same was duly received by him and the acknowledgment due card dated 23.03.2006 (Exh.D2) bears his signature, while this fact has been verified by the postal department with reference to the postal receipt No.1439. Evidently, such correspondence on the part of petitioner confirms that he was willing and interested to comply with the terms of agreement to sell (Exh.D1) in letter and spirit. It is settled principle in terms of Order-V, Rule 10-A(2) CPC refers as under that:

> *"(2) An acknowledgement purporting to be signed by the defendant of the receipt of the registered communication or an endorsement by a postal employee that the defendant refused to take delivery of the same shall be deemed by the Court issuing the summons to be prima facie proof of service of summons."*

The abovementioned concept of service despite being recognized in Civil Procedure Code, it has also been acknowledged in Sec.27 of the General Clauses Act, 1897 whereby the summon sent by means of registered post and properly addressed, service shall be presumed to have been effected, even where envelope is endorsed as refused. Reliance is placed upon ***2003 CLC 838 [Lah] (Umar Khan vs. Abdul Ghafaar), PLD 1990 Karachi 312 (United Bank Ltd. vs. S.G. Rauf & Co.), PLJ 1980 Kar 62 (Muhammad***

Suleiman Malik vs. Royal Trust Corporation), PLD 1978 Lahore 193 (Umer Din vs. Fazal Din). Even, the postal acknowledgment has to be seen in the light of principles laid down in ***1979 CLC 48 [Kar] (Muhammad Sulaiman Malik vs. Royal Trust Corporation of Canada), 2003 CLC 1011[Lah] (Syed Sajjad Hussain Shah vs. Federation of Employees Cooperative Housing Societies Ltd.) and 1986 CLC 1735 [Kar] (Pehlawan Khan vs. Najma Mujtaba)***.

9. Although, respondent No.1 denied receiving of legal notice Exh.D2/2 in his evidence as PW-1 and even denied the suggestion regarding receiving of legal notice Exh.D2/1 through registered post Exh.D2, he also denied receiving of the second legal notice Exh.D4/1, whereas this very fact of denial of receiving of legal notices Exh.D2/1 dated 20.03.2006 and Exh.D4/1 dated 03.05.2006 has not been referred in exclusivity in his examination-in-chief, whereas the written statement of petitioner filed in the learned Trial Court noticeably confirms this plea in Para-9 of the preliminary objection, Para-4 of the facts portion, and also refers the legal notices Exh.D2/1 and Exh.D4/1 along with postal receipts and acknowledgment due receipts, which were attached with the written statement in terms of Order VII, Rule-14(i) "فہرست دستاویزات پیش کردہ", in which both the legal notices have been referred along with receipts, even the petitioner provided the change of cost of land and schedule known as revised schedule for payment of land in Phase-IV along with copies of receipts of deposit of amount in FGEHF as well as copies of pay orders of installments, therefore, it can safely be concluded that all these factors were well within the knowledge of respondent No.1 before entering into a witness box as PW-1 but he has not denied all these factors in his examination-in-chief which require an affirmative statement to this fact even the respondent No.1 has not proved his own counter stance of non-receiving of legal notices. As

a matter of fact, the minimum requirement to prove the communication mode of any notice, letter or document which has been dispatched to the receiving party, the sender has to submit the duly signed postal receipt of the post office endorsed with a number and date, whereas the acknowledgment receipt, called as acknowledgment due, when returned to the sender, confirms that service of the post has been completed. The service shall be deemed to be effected by properly addressing pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. This presumption is in favour of petitioner who has delivered the legal notices through registered post and receipts (Exh.D2/2 and Exh.D4/2) in this regard have been exhibited without any objection which were further substantiated through Exh.D2/acknowledgement due and Exh.D4/acknowledgement due, even otherwise, both these acknowledgement due receipts bear the signatures of consignee/Muhammad Khalid.

10. The certificate of posting is an official document whereby address of the addressee on such certificate being correct, presumption rise of letter having been received by addressee unless a contrary has been proved. Even otherwise, such document of postal certificate is a public document signed by Government functionaries, thus presumption of its correctness could not be doubted. Reliance is placed upon ***2004 SCMR 1773 (M/s Journalist Publication Pvt. Ltd. vs. Mst. Mumtaz Begum alias Mustari Begum)***. It is also settled proposition that there is no need to produce postman as there is presumption under the Qanun-e-Shahadat Order, 1984, it is for addressee to prove that notice has not been served. Reliance is placed upon ***1974 SCMR 136 (Muhammad Sharif vs. Maqbul Ahmad), 1968 SCMR 828 (****no title as per website****), 1972 SCMR 251 (Gulzar Begum vs. Saira Bibi)***. In terms of Article

129 of Qanun-e-Shahadat Order, 1984, the presumption is in favour of sender of letter that letter duly posted on certain address is delivered at that address within usual time and that same reached at its destination and such presumption is in respect of ordinary post and is to be considered stronger in case of registered post. However, mere denial on the part of respondent No.1 in the instant case regarding non-receiving of legal notices Exh.D2/1 and Exh.D4/1 is not enough to discharge the onus placed upon him i.e. the addressee. Hence, it can safely be concluded on the basis of available evidence that petitioner has discharged the onus of delivery of legal notice dated 20.03.2006, whereby he issued a warning to respondent No.1 for payment of installments as per new schedule of Rs.470,000/- and when it has not been complied with, petitioner then issued a final legal notice 03.05.2006 Exh.D4/1 for cancellation of agreement.

11. It has further been observed that the signature of Muhammad Khalid/respondent No.1 available on Exh.P1, if put in juxtaposition with the signatures available on the acknowledgment due cards (Exh.D2 and Exh.D4) regarding service of legal notices Exh.D2/1 and Exh.D4/1, the same appear to be identical as of similar character, angles and shape and this Court while comparing all these signatures comes to the conclusion that it is visible through naked eye that they are same and there is no disparity amongst those signatures of Muhammad Khalid, although signatures can be proved by other modes but this Court can exercise this power keeping in view the principles laid down in ***2005 CLC 870 [Lah] (Muhammad Yaqoob vs. Hameeda Begum), PLD 1992 [Lah] 366 (Arif Beg vs. Mubarik Ali)*** and ***1999 SCMR 85 (Waqas Enterprises vs. Allied Bank of Pakistan)***.

12. On the contrary, respondent No.1 with delay of about seven (07) months of termination of agreement, filed a civil suit for specific performance of agreement to sell on 06.12.2006. Whereas, petitioner himself

deposited the installments by way of depositing of Rs.60,000/- Deposit Slip dated 18.02.2006 Exh.DA, Rs.60,000/- Deposit Slip dated 07.06.2006 Exh.DB, Rs.60,000/- Demand Draft dated 18.10.2006 Exh.DC, Rs.60,000/- Demand Draft dated 26.02.2007 Exh.DD, Rs.60,000/- Demand Draft dated 25.06.2007 Exh.DE, Rs.60,000/- Demand Draft dated 25.10.2007 Exh.DF, Rs.60,000/- Demand Draft dated 02.02.2008 Exh.DG and Rs.75,000/- Demand Draft dated 25.02.2006 Exh.DH. In this regard, petitioner also produced detailed statement Exh.DI issued by FGEHF showing amount deposited by the allottee/petitioner. However, there was a particular clause mentioned in Agreement to Sell Exh.P1 regarding payment of price, development charges, service charges and other dues of the suit plot, which is reproduced as under:

> *"And that the total FGEHF's price, development charges, service charges and other dues of the said plot will be deposited by the second party (Muhammad Khalid) with FGEHF (within prescribed dates) on behalf of the first party (Saeedullah Khan) and to pay the balance amount of Rs.6,50,000/- (Rupees six lac fifty thousand only) to the first party at the time of transfer/execution of General Power Of Attorney and other relevant documents."*
> (Underlining is provided for emphasis)

The above referred clause gives rise to a fact that the onus to discharge obligation is upon Muhammad Khalid/second party to pay price, development charges, service charges and other dues of suit plot regarding the suit plot, whereas the emphasis given in the said clause is on the words **(*within prescribed dates*).** Hence, the two pre-conditions for enforcement of specific performance of agreement are:

i. payment of price, development charges, service charges and other dues of suit plot by the plaintiff/Muhammad Khalid/second party.

ii. Within prescribed dates.

In view of above two pre-conditions, it can safely be concluded that respondent No.1 while appearing as PW-1 has not discharged his onus of

performing a particular term and condition which is the essence of the entire agreement and non-performance of such responsibility leads to "***breach of terms***" which is evidently on the part of respondent No.1. However, respondent No.1 deposited Rs.180,000/- for the first time through Exh.P8 referred as Exh.P5, though the same was deposited on 06.11.2006 i.e. after delay of about six (06) months, but fact remains the same that respondent No.1 neither approached the office of FGEHF nor even taken care of his responsibility even after receiving the legal notice dated 20.03.2006, which was warming on the part of petitioner and finally when the agreement was terminated through second legal notice dated 03.05.2006 Exh.D4/1, respondent No.1 remained silent for next six months and thereafter filed a civil suit.

13. On the other hand, it was binding on the learned Trial Court as well as the first Appellate Court to give findings as to whether the "breach of terms" is on the part of petitioner or on respondent No.1, while I have gone through the judgments of both the Courts below but surprisingly the learned first Appellate Court neither furnished findings nor reasons to support its judgment rather authored only seven lines while deciding the RFA in the following manner as referred in Para-6 of the impugned judgment:

> *"After going through the placed record and hearing arguments of learned counsel for the parties, it appears that an Issue No.4 paragraph No.11 is very much relevant and exhaustively discussed at length and is not suffering from any illegality or irregularity. The order of the trial Court is very much clear and according to law. The execution of the agreement is not disputed and agreement Ex.P/1 has been admitted so it is very right observed by the learned trial Court that agreements stands proved. Hence, the learned trial Court has rightly observed that the legitimate relief cannot be refused mere on technicalities."*

The above referred **findings of the learned Appellate Court while hearing the RFA does not qualify the prerequisites of Order XX Rule 5 CPC as the Court has not given its findings or decision with reasons**, which is the

mandatory requirement and even otherwise, the first Appellate Court is under legal obligation in terms of Order XLI, Rule 31 CPC that judgment shall be in writing and the Appellate Court shall state:

a) the points for determination;

b) the decision thereon;

c) the reasons for the decision; and

d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

Whereas, the entire judgment passed by the first Appellate Court does not qualify the test and requirements of the law as there is no decision with regard to each point which is the main requirement, failing which the judgment has no effect. Reliance is placed upon ***1996 SCMR 669 (Iftikhar-ud-Din Haidar Gardezi vs. Central Bank of India Ltd., Lahore), 2006 CLC 297 (Aqeel Hussain vs. Mst. Alia Bibi)***. It is also necessary for Appellate Court to record points of determination so that it can be determined whether the learned Trial Court has dealt with all the issues in accordance with law or otherwise. Reliance is placed upon ***2006 CLC 35 (Hidayatullah Khan vs. Ajmal Khan)*** and ***2006 CLC 1324 (Shair Rehman vs. Said Dilawar Jan)***. Whereas, if all these requirements have not been meted out the judgment would be called as non-speaking one. Hence, I am of the humble view that the first Appellate Court neither referred the evidence nor taken the legal points for determination, therefore, it is necessary to go through the judgment of the learned Trial Court to ascertain as to whether aforesaid aspects have been adored or else.

14. I have gone through the issues framed by learned Trial Court vide order dated 21.06.2011, whereby the first three issues are material:

> *1. Whether the defendant No 1 had entered into agreement to eel the plot required to be allotted in his name, vide application No. 055892, for total sale consideration / profit of Rs.5,36,000/- out of which he had received Rs. 1,00,000/- on 26.12.04 and remaining*

> *amount of Rs.4,36,000/- was required to be paid, at the time of transfer of suit plot, in the name of plaintiff? OPP*
>
> *2. Whether the plaintiff had to pay balance costs of land of Rs.2,50,000/- out of which plaintiff had got deposited Rs.1,80,000/- through pay order dated 6.11.06? OPP*
>
> *3. Whether the defendant No. 1 was requested time and again for completion of requisite formalities and delivery of provisional allotment letter to him but defendant No. 1 has refused to do so? OPP*

The above referred issues are very material to determine as to who is the responsible for breach of terms of agreement, whereas the Trial Court while considering the evidence has given its findings on Issue No.1 that the execution and admission of the agreement which is admitted by both the parties, hence same has rightly been declared affirmative in favour of respondent No.1, whereas the second issue regarding payment of balance cost of the land was also decided in favour of respondent No.1/plaintiff. The learned Trial Court referred legal notice in the findings of Issue No.2, wherein it was specifically authored by the learned Trial Court that:

> *"Though there is presumption regarding the receipts that the same has been served on the plaintiff, but the plaintiff was confronted with the same, denied that the said notices were ever served on him and also denied to have the signed the same."*

The above referred observation of the learned Trial Court is not conclusive to the facts and even the learned Trial Court has not given its findings upon the admissibility of postal receipts Exh.D2/2, Exh.D4/2 as well as the acknowledgement due receipts Exh.D2 and Exh.D4, whereas this Court while examining the law on subject in terms of Sec.27 of the General Clauses Act, 1897 has given a detailed view referred in Para-10 of the instant judgment, whereby this Court concluded that the service of legal notices has duly been made and same has been proved in accordance with law by petitioner on the principles referred in the pronouncements of Superior Courts, therefore, the findings on Issue No.3 are contrary to the

record and law. Whereas, Issue No.4 deals with specific performance, however the learned Trial Court has not given its findings on the basis of evidence in its true perspective.

15. In view of above reasons and factors, this Court comes to the conclusion that breach of terms of Exh.D1 is on the part of respondent No.1/plaintiff, who was responsible to deposit the amount of plot of FGEHF be that as it may the development charges, cost of land or any other amount and after the issuance of Exh.D3, a legal notice Exh.D2/1 was issued to respondent No.1 on 20.03.2006 which was not complied with and finally a legal notice Exh.D4/1 for termination of agreement was issued. Both the notices have been proved in accordance with law, the breach of terms is attributed to respondent No.1/plaintiff and even otherwise, the specific performance of agreement is a discretionary relief which can only be given to the plaintiff if he shows his willingness in unconditional and in unequivocal terms that he is willing and ready to perform his part of agreement and no breach is attributed to him. Whereas, in case of any contrary evidence of contract, the specific performance of agreement to sell in terms Section 12 read with Section 20 of the Specific Relief Act, 1877, the Court can refuse to exercise the discretion in favour of plaintiff even if the execution of agreement has not been denied, whereas the relevant provision of Section 22 of the Specific Relief Act, 1877 is reproduced as under:

> *"22. Discretion as to decreeing specific performance.– The jurisdiction to decree 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 is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.*
> *The following are cases in which the Court may properly exercise a discretion not to decree specific performance:-*
> *I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.*

> *II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.*
> *III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance."*

The above referred provision has been considered by the apex Court in ***PLD 2014 SC 506 (Liaqat Ali Khan vs. Falak Sheikh and others), PLD 2010 SC 952 (Mst. Mehmooda Begum vs. Syed Hassan Sajid and two others), 2010 SCMR 1507 (Shakil Ahmad vs. Mst. Shahina Kausar)*** and ***2012 SCMR 900 (Muhammad Sharif others vs. Nabi Bux and others)***. Whereas, the latest view rendered by the apex Court in ***PLD 2015 SC 187 (Farzand Ali vs. Khuda Bakhsh and others)***, is reproduced as under:

> *"the Court may refuse to allow the relief of specific enforcement. And that the court is neither obliged to grant the relief of specific performance nor can the plaintiff claim it as matter of right. Therefore, in our considered opinion, this case on account of its peculiar facts and circumstances has to be decided and resolved in the light and on the basis of discretionary principles."*

16. Keeping in view the above referred principles of the apex Court as well as the provisions of Section 22 of the Specific Relief Act, 1877, I am of the view that the subject matter of the agreement to sell was not in existence at the time of execution of agreement to sell Exh.P1, whereas no plot number, street number or sector was determined, mentioned or available rather all these issues pertain to objectivity of the agreement as without the existence of suit property the performance could not be claimed nor even any legal enforcement can be made, although the eligibility of allotment of petitioner was in existence but it does not create a substantive right even in his own favour. Whereas, respondent No.1 in his evidence as PW-1 refers Plot No.26, Street No.34, Size 30*60, Sector G-14/1, Islamabad, but fact remains the same that no title document was brought on record and the agreement to sell was executed only on the basis of an application which was submitted by petitioner before the FGEHF. Furthermore, from the

perusal of entire record no allotment letter was ever filed on record, the acknowledged document in the proceedings is Exh.D3, called as **Provisional Offer of Allotment of a Plot in Phase-IV of the FGEHF Scheme Islamabad**.

17. The above referred subject of Exh.D3 does not confirm the existence of any legal right to be enforced rather it is dependent upon the contingency and terms and conditions of payment schedule which have not been complied with by respondent No.1 and hence, no legal right accrues in favour of respondent No.1 and even in terms of Section 21 of the Specific Relief Act, 1877 a contract, which in nature is revocable or which does not bear reasonable certainty, is not enforceable by law, therefore, keeping in view the circumstances referred in the entire evidence on record, this Court is bound to see the peculiar facts and circumstances of this case, particularly the terms agreed between the parties, its language, subsequent conduct and other surrounding circumstances. Whereas, the overall circumstances as well as the law on subject gives rise to a situation that the agreement to sell Exh.P1 is not enforceable under the law by any stretch of imagination and both the Courts below have not considered the law in terms of the Specific Relief Act, 1877, the General Clauses Act, 1897 as well as judicial principles referred by the apex Court in different pronouncements, therefore, the concurrent findings are not sustainable. However, in order to meet the end of justice it is necessary to discuss the revisional powers of the High Court in this regard, whereas it is settled proposition of law that the findings on questioned fact or law, how erroneous the same may be if recorded by the Court of competent jurisdiction, the same cannot be interfered with by the High Court in exercise of revisional jurisdiction under Section 115 CPC unless such findings suffer from controversial defects, illegality or material irregularity. Reliance is placed upon ***2010 SCMR 817 (Molvi Muhammad***

Azim vs. Alhaj Mehmood Khan Bangash), 2010 SCMR 5 (Muhammad Idrees and others vs. Muhammad Parvez and others), 2000 SCMR 431 Anwar Zaman and 5 others vs. Bahadur Sher and others), 2015 SCMR 799 (Iqbal Ahmed vs. Muhammad Provincial Urban Development Board, NWFP, Peshawar), PLD 2015 SC 137 (Mandi Hassan alias Mehdi Hussain vs. Muhammad Arif), 2012 SCMR 730 (Administrator, Thal Development through EACO Bhakkar vs. Ali Muhammad), 2012 SCMR 1373 (Noor Muhammad vs. Mst. Azmat-e-Bibi). Whereas, the latest view rendered by the apex Court in ***2016 SCMR 24 (Nazim-ud-Din vs. Sheikh Zia-ul-Qamar)***, has been reproduced as under: wherein it was held that,

> *"Ordinarily the revisional Court would not interfere in the concurrent findings of fact recorded by the first two Courts of fact but where there was misreading and non-reading of evidence on the record which was conspicuous, or where there was an error in the exercise of jurisdiction by the Courts below and/or where the Courts had acted in the exercise of its jurisdiction illegally or with material irregularity, the revisional Court shall interfere and could upset the concurrent findings."*

18. In view of above referred principles of apex Court regarding power under 115 CPC, I am of the considered view that learned Trial Court through its judgment dated 31.03.2015 has not considered the law on subject of the Specific Relief Act, 1877 nor even considered the admissibility of documents Exh.D2/1 Legal Notice dated 20.03.2006, Postal Receipt Exh.D2/2, Exh.D4/1 Legal Notice for termination of agreement dated 03.05.2006, its postal receipt Exh.D4/2, the acknowledgment due cards Exh.D2 and Exh.D4, which bear the signatures of Muhammad Khalid/respondent No.1 as well as the basic conditions of agreement for deposit of development charges of FGEHF referred in Exh.P1 and wrongly exercised the jurisdiction with material defects and passed the impugned judgment which is not sustainable in the eyes of law and similarly the first Appellate Court has not bothered to discuss the evidence in its true

perspective rather passed a final judgment in appeal with only six lines in Para-6 which do not qualify to be called as reasons. Hence, both the Courts below have evidently committed a mistake which is material for the conclusion of the matter and if such findings are not disturbed in revisional jurisdiction, it will materially affect the merits of the case, therefore, while exercising jurisdiction under section 115 CPC, it has been observed that both the Courts below have misread the evidence and based its findings on controversial facts and wrong parameters.

19. For what has been discussed above, both the judgments & decrees i.e., judgment dated 31.03.2015 passed by the learned Civil Judge (West) Islamabad as well as judgment dated 17.09.2015 passed by learned ADJ-IV (West), Islamabad are hereby "**set aside**". The suit titled "*Muhammad Khalid vs. Saeedullah and others*" filed by respondent No.1 is hereby dismissed as the agreement to sell dated 26.12.2004 is not enforceable under the law. Office is directed to prepare the decree sheet accordingly.

20. Before parting with this judgment, it is necessary to decide the fate of amount of Rs.100,000/- received by petitioner as earnest money from respondent No.1 through agreement to sell dated 26.12.2004 (Exh.P1), the same was also acknowledged by petitioner in the learned trial Court, therefore, petitioner is directed to return the said amount of Rs.100,000/- to respondent No.1 keeping in view the depreciation of money and increase in the value of plot/land, hence, amount of Rs.100,000/- stand enhanced to Rs.1,000,000/- (rupees one million) as petitioner kept the amount with him from the date of agreement to sell i.e. 26.12.2004, which is almost 13 years. Reliance is placed upon ***2016 MLD 1623 [Lahore] (Haji Zahoor-ud-Din vs. Khalid Latif and others), 2015 SCMR 12 (Muhammad Iqbal vs. Mehboob Alam)***, and ***2017 SCMR 902 (Malik Bahadur Sher Khan vs. Haji Shah Alam and others).***

21. Respondent No.1 also deposited Rs.180,000/- (Exh.D5) in the account of FGEHF which shall be returned to respondent No.1 on his application to FGEHF/respondent No.2 after due verification. Similarly, respondent No.2 shall also apply for withdrawal of amount of Rs.436,000/- deposited in the Court account through Exh.P7/Bank Challan as well as amount of Rs.651,600/- which was deposited by respondent No.1 in the Court account under the head of cost of the land vide Bank Challan dated 14.04.2015 against the suit plot, shall also be released by the Court subject to verification. However, neither in any manner interest or mark up can be claimed on these amounts nor respondent No.1 is entitled for such additional compensation.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 22nd November, 2017.

JUDGE

Khalid Z.