

JUDGEMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Regular Second Appeal No.06 of 2014

Asif Ali Hashmi through four(4) legal heirs
Vs.
Muhammad Arif Mian & four (4) others.

Appellants by: Sardar Liaqat Ali, Advocate.

Respondents by: Niaz Ullah Khan Niazi, Advocate.
Abdul Khaliq, Advocate.

Date of hearing: 26.03.2015

Aamer Farooq, J.- The present appeal is directed against judgement and decree dated 10.07.2014 whereby the appeal filed by the appellants against judgement and decree dated 28.05.2003 passed by Civil Judge, Islamabad, was dismissed.

2. The brief facts leading to the filing of present appeal are that predecessor-in-interest of the appellants, namely, Asif Ali Hashmi entered into an agreement to sell dated 13.09.1995, with Muhammad Arif Mian (Respondent No.1), with respect to plot No.446, measuring 200 Sq. Yards situated in Sector G-11/1, Islamabad (**the Property**) for a total consideration of Rs:1,225,000/- (Rupees one million, two hundred twenty five thousand only). In this behalf a sum of Rs.25,000/- (Rupees twenty five thousand only) was paid in cash and Rs:300,000/-

(Rupees three hundred thousand only) through cheque. Sum of Rs:890,000/- (Rupees eight hundred ninety thousand only) was to be paid by respondent No.1 by or before 17.11.1995 with a grace period of 15 days and sum of Rs:10,000/- (Rupees ten thousand only) was to be paid to the original allottee at the time of transfer. Said Asif Ali Hashmi had earlier entered into an agreement to purchase the referred property with respondent No.2 for a consideration of Rs:825,000/- (Rupees eight hundred twenty five thousand only) and had paid a sum of Rs:815,000/- (Rupees eight hundred fifteen thousand only) to the referred vendor. Respondent No.2 also executed general power of attorney in favour of Asif Ali Hashmi which was duly registered with Joint Sub Registrar, Islamabad. The said power of attorney also contained the power to sell the property. The transaction between Asif Ali Hashmi and respondent No.1 did not materialize and the latter filed a suit for specific performance of agreement dated 13.09.1995 in the Civil Court, Islamabad. Out of divergent pleadings of the parties following issues were framed:

- i) *Whether the plaintiff has no cause of action or locus standi to file the suit? OPD.*
- ii) *Whether the suit is not maintainable in its present form? OPD.*
- iii) *Whether the time was the essence of the contract and the plaintiff has failed to perform his contractual obligations within the stipulated time contained in the agreement to sell, hence, the suit is liable to be dismissed? OPD.*
- iv) *Whether the instant suit has been filed with malafide intentions in order to gain time, moreover, the plaintiff wanted to reap the fruit of escalation in price of the suit house which has*

now gone up to Rs:18,00,000/- hence, it is liable to be dismissed? OPD.

- v) Whether the suit property is not transferable, therefore, no sale agreement could be executed regarding the suit property and its specific performance cannot be claimed? OPD.*
- vi) Whether the defendant No.1, on behalf of defendant No.2, spent a huge amount of RS:1,00,000/- to finally complete the house? OPD.*
- vii) Whether the suit is not maintainable and is liable to be dismissed under section 34 of Specific Relief Act, 1877? OPD.*
- viii) Whether the plaintiff has not come to the court with clean hands, hence, he is not entitled for any equity, therefore, the suit is liable to be dismissed? OPD.*
- ix) Whether the suit is false, frivolous and vexatious, therefore, the answering defendant is entitled to special costs u/s 35-A CPC? OPD*
- x) Whether the plaintiff has no cause of action or locus standi to file the present suit? OPD*
- xi) Whether the suit is not maintainable in its present form? OPD*
- xii) Whether the plaintiff did not perform his part of contract by not making the payment of the amount Rs:8,90,000/- within the stipulated period, therefore, the arrangement stands cancelled and the earnest money has been forfeited as agreed in the agreement, hence, the suit is liable to be dismissed? OPD.*
- xiii) Whether the suit is not maintainable and is liable to be dismissed under section 24 of Specific Relief Act, 1877? OPD.*
- xiv) Whether the plaintiff has not come to the Court with clean hands, therefore, the suit is not maintainable and is liable to be dismissed? OPD.*

xv) Whether the suit is false, frivolous and vexatious and has been filed with malafide intentions, therefore, the answering defendant is entitled to special costs under section 35-A of CPC? OPD.

xvi) Whether the plaintiff is entitled to specific performance, mandatory injunction, permanent injunction and recovery of possession? OPP.

xvii) Relief.

3. The parties led their respective evidence and on the basis thereof the suit was decreed vide judgement and decree dated 28.05.2003. Asif Ali Hashmi preferred appeal before the District Judge, Islamabad which was dismissed vide judgement dated 06.01.2010. Second appeal was filed (RSA No.3/2010) which was disposed of by this Court and the case was remanded to the Appellate Court for decision afresh. During pendency of the appeal Asif Ali Hashmi died and his legal heirs (the present appellants) were impleaded as appellants. The referred appeal was also dismissed vide judgement dated 10.07.2014.

4. The learned counsel for the appellants, inter alia, submitted that respondent No.1 is not entitled for specific performance of agreement dated 13.09.1995 inasmuch as time was of the essence of the agreement and the referred respondent on the stipulated date did not turn up for payment of remaining consideration amount and transfer of the property. In this behalf learned counsel for the appellants pointed out that the predecessor-in-interest of the appellants wrote a letter mark **D/1** on 26.11.1995 asking respondent No.1 to perform his part of obligation but to no avail. It was also contended by the learned counsel that the appellants were ready and willing at the material time to fulfill their obligation to transfer the property

but it was respondent No.1 who defaulted in his obligation. It was further contended that the agreement in question could not have been ordered to be specifically performed in the light of Sections 12 & 22 of the Specific Relief Act, 1877. In this behalf learned counsel placed reliance on cases (**PLD 2014 SC 506**) and unreported judgement of the Hon'ble Supreme Court of Pakistan (**C.P. No.1438/2009**). The learned counsel also placed reliance on cases titled "Anwar Sajid vs. Abdul Rashid Khan and another" reported as (**2011 SCMR 958**), "Mst. Mubin Fatima vs. Muhammad Yamin and 2 others"(**PLD 2006 SC 214**), "City Education Board vs. Mst. Maqbool Nasreen" (**PLD 2008 Lahore 51**).

5. The learned counsel for respondent No.1, inter alia, submitted that time was not the essence of the agreement. It was further contended that respondent No.1 has always been ready and willing to perform his part of the bargain. In this behalf the learned counsel submitted that under the agreement between Asif Ali Hashmi and respondent No.1 the former had to provide a number of documents which were **sine qua non** for transfer of the property. Since predecessor-in-interest of the appellants failed to provide the referred documents, therefore, the transaction could not materialize on due date. The learned counsel also submitted that the appeal is incompetent because Asif Ali Hashmi was the Attorney of respondent No.2 and with his demise, his legal heirs have no locus standi to file the appeal. The learned counsel in support of his contentions placed reliance on case law titled "Mehmood Rangoonwala vs. Government of Sindh & others"(**2006 CLC 611**) *Karachi* and

“M/s U.K. International Proprietorship Concern vs. Trading Corporation of Pakistan” (2006 CLC 679) *Karachi*.

6. The execution of the agreement dated 13.09.1995 is admitted between the parties. The questions raised in the present appeal are whether time was of the essence of the agreement and also whether the Courts below while allowing the specific performance of the agreement have exercised their discretion contrary to the provisions of Sections 12 & 22 of Specific Relief Act, 1877. The date for completion of the transaction as provided in the agreement was 17.11.1995 with grace period of 15 days. There is no specific clause in the said agreement which provides that time is of the essence of the agreement. In the agreements pertaining to immovable properties time is not regarded as the essence of the agreement, however, this is not an absolute rule and if the intention of the parties is to the contrary then the time is of the essence. In support of referred principle reliance is placed on “Mohammad Iqbal vs. Mohammad Alam”(2015 SCMR 21) wherein it was observed that in relation to contracts of immoveable property the rule is that time ordinarily is not the essence, however, this by no means is an absolute rule and it is always open to the party, who claims exception thereto, to establish otherwise from the contents/text letter and spirit of the agreement and/or from the conduct of the parties as well as attending circumstances. In “Abdul Hamid vs. Abbas Bhai” (PLD 1962 SC 1) the Hon’ble Supreme Court held as follows:

“Section 55 of the Contract Act, 1872, does not lay down any principle which differs from the law of England as to contracts for the sale of land. Specific performance of a contract of that nature will be granted

although there has been a failure to keep the dates assigned by it, if justice can be done between the parties and if nothing in, (a) the express stipulation of the parties, (b) the surrounding circumstances, make it inequitable to grant relief. An intention to make time of the essence of the contract must be expressed in unmistakable language; it may be inferred from what passed between the parties before, but not after, the contract is made. Equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time.

If time is not originally made of the essence of a contract for sale of land, one of the parties is not entitled afterwards by notice, to make it of the essence, unless there has been some default or unreasonable delay by the other party.”

In 1997 SCMR 1006 (Agha Ghazanfar Ali vs. Shaukat Ali & others) the Hon’ble Supreme Court observed as follows:

“This was a contract in respect of sale of immovable property and the same was specifically enforceable in view of section 12 of the Specific Relief Act. The explanation below section 12 of said Act shows that the Court shall presume that the breach of a contract to transfer immovable property, cannot be adequately relieved by compensation in money and that the breach of a contract to transfer movable property can be thus relieved. Even perusal of the sale agreement between the parties shows that time was not the essence of the contract.

It would be too much for the respondent No.1 to be deprived of the property, which was agreed to be sold to him ten years back and of which he paid 5/6 part of the price. It would be inequitable as well as immoral to deprive the respondent No.1 of the fruit of the sale agreement dated 10-6-1987. Hence, leave to appeal is refused and this petition stands dismissed.”

As observed above, there is no specific clause in the agreement according to which time is of the essence, however, it is provided in the agreement that if the vendor (Asif Ali Hashmi) fails to complete the transaction and provide documents within prescribed time period then the vendor shall be responsible to pay double the amount or the vendee shall enforce the agreement through Court of law. Likewise it is provided in the agreement that if vendee backs out then the deal shall stand cancelled and the earnest money would be forfeited. In the agreement it is also provided that predecessor-in-interest of the appellants was to provide certain documents, which are detailed in the agreement. The referred documents are as follows:

- a) *Deed of general power of attorney (For FGEH).*
- b) *Deed of general power of attorney (For CDA).*
- c) *Deed of irrevocable general power of attorney.*
- d) *Deed of special power of attorney (for taking over the possession).*
- e) *Deed of sale agreement.*
- f) *Deed of pledge agreement.*
- g) *Affidavit for nomination of nominee.*
- h) *Affidavit for declaration of legal heirs.*
- i) *Affidavit for the sale of the said plot.*
- j) *Affidavit from the wife of allottee.*
- k) *Acceptance letter from the legal heirs of allottee.*
- l) *Covering letters in respect of the power of attornies etc.*

7. The version of the appellants is that late Asif Ali Hashmi was ready and willing to transfer the property and the documents in question were not a prerequisite for the transfer. In order to prove their claim the appellants examined Muhammad Tahir as DW-1, Muhammad Sagheer as DW-2 and Asif Ali Hashmi as DW-3. Asif Ali Hashmi admitted in cross-

examination that documents could not be prepared prior to 02.12.1995. Therefore, the pre-requisite for transfer of the property could not be completed before due date. Asif Ali Hashmi deposed that he wrote a letter to respondent No.1 for timely completion of the transaction, however, the referred letter was not duly proved as copy of the same was tendered in evidence as Mark-D/1. The Hon'ble Supreme Court in case titled "State Life Insurance of Pakistan vs. Javaid Iqbal" (2011 SCMR 1013) held that mark has no evidentiary value and cannot be treated as part of evidence. In this backdrop the appellants cannot raise issue of time being essence of the agreement inasmuch as the requisite documents for the accomplishment of the transaction could not be completed by their predecessor-in-interest. Even otherwise the general rule with respect to immovable property that time is not of the essence and it is only where there is intention to the contrary then the rule changes. In the present case there is no mis-reading or non-reading of evidence on the part of courts below which leads to the inference that time was of the essence. The case law relied upon by the learned counsel for the appellants is to the effect that the Court can refuse to pass order for specific performance of agreement and transfer of property where it is inequitable to do so. In the case titled "Farzand Ali & another vs. Khuda Baksh & others" (PLD 2015 SC 187) Hon'ble Supreme Court clinched the law on the subject by laying down the principles for refusing to Order specific performance of the agreement which has been duly proved in evidence. The discretion to refuse specific performance of an agreement is provided in section 22 of Specific Relief Act, 1877. Relevant

part of the judgement by the Hon'ble Supreme Court is as follows:

“It is settled law that grant of specific enforcement of an agreement to sell pertaining to an immovable property is a discretionary relief otherwise and specifically in terms of section 22 of the Specific Relief Act, 1877, which mandates:--

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.

The aspect of exercise of discretion and the noted provision has come under consideration for its interpretation and application before this Court in a large number of cases. And few of the judgments have been selected for guidance. In this context in Liaqat Ali Khan and others v. Falak Sher and others (PLD 2014 SC 506) it has been held:--

A plain reading of above reproduced statutory

provision leads to a definite conclusion that the relief of specific performance claimed by respondents Nos.1 to 4 in their suit is, purely discretionary in nature and the Court is not bound to grant such relief merely as it is lawful to do so. At the same time, the discretion to be exercised by the Court shall not be arbitrary, but it should be based on sound and reasonable analysis of the relevant facts of each case, guided by judicial principles.....it will be the peculiar facts and circumstances of each case, particularly, the terms of the agreement between the parties, its language, their subsequent conduct and other surrounding circumstances, which will enable the Court to decide whether the discretion in terms of section 22 (ibid) ought to be exercised in favour of specific performance or not."

In *Mst. Mehmooda Begum v. Syed Hassan Saijad and 2 others* (PLD 2010 SC 952), it has been categorically ordained as under:

Supreme Court was competent to consider the conduct of parties to agreement and circumstances attending to its execution, if specific performance would give an unfair advantage to plaintiff over defendant then the same should be refused.

Further in *Shakeel Ahmed v. Mst. Shaheen Kousar* (2010 SCMR 1507) this Court opined:

Such discretion must be exercised on sound judicial principles of equity, fairness and good conscience and not on erroneous assumption or presumption---Court is not bound to grant relief merely because it is lawful to do so irrespective of the conduct of contracting parties and no unfair advantage to be given to a party or to the other in the suit for specific performance---Relief can be refused though there may not be any fraud or misrepresentation on the part of plaintiff.

In Muhammad Sharif and others v. Nabi Bakhsh and others (2012 SCMR 900) while considering the remedy in the cases pertaining to the suit for specific performance and the power of the Court, it has been held:

Remedy by way of specific performance for being an equitable relief and discretionary could not be claimed as of right---Court would not be bound to grant such relief merely because doing so would be lawful."

Besides the above in line thereto, there is a plethora of dicta of this Court on this point. The pith and substance of the entire case-law on the subject is, that even in the case(s) where the agreement to sell is validly proved by the plaintiff, for the reasons which are by now quite settled for the exercise of the discretion by the courts, the courts 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 a matter of right."

The suit was filed by respondent No.1 against respondent no.2 as the original allottee of the property and the predecessor in interest of appellants as Attorney of the original allottee. After the demise of Attorney his legal heirs have no locus standi to institute the present appeal since the property was never transferred by respondent No.2 in favour of Asif Ali Hashmi (predecessor-in-interest of appellants). In the present case there is nothing on record which shows that the impugned judgement and decree is inequitable or by allowing specific performance respondent No.1 shall have an advantage over the appellants. Moreover, the plea that specific performance is discretionary and should not be allowed was not taken before the Courts below and even before this Court circumstances were not

pointed which would make the specific performance unjust or unfair.

8. Since there is no mis-reading and non-reading of the evidence, therefore, there is no legal infirmity in the impugned judgment and decree. Moreover, there is also nothing on record which shows that the discretion exercised by the Courts below in granting relief of specific performance to respondent No.1 is contrary to the settled principles.

9. In view of above, the present appeal being devoid of merits is dismissed.

(AAMER FAROOQ)
JUDGE

Altaf Malik

Announced in open Court on the 29th day of May 2015.

JUDGE

Approved for reporting.