

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT,**  
**ISLAMABAD**

1. Regular First Appeal No.125 of 2017  
Muhammad Safdar Khan  
Versus  
Muhammad Nadeem Abbasi
2. Regular First Appeal No.126 of 2017  
Muhammad Safdar Khan  
Versus  
Muhammad Nadeem Abbasi
3. Criminal Original No.180 of 2020  
Muhammad Nadeem Abbasi  
Versus  
Muhammad Safdar Khan.

Appellant by: Syed Javed Akbar, Advocate,  
Respondents by: Mr. Muhammad Wajid Hussain Mughal,  
Advocate,  
Date of Hearing: 03.12.2020

**FIAZ AHMAD ANJUM JANDRAN, J.-** Listed Regular First Appeals (125 & 126 of 2017) emanate from consolidated judgment and decree dated 05.06.2017, passed by the learned Civil Judge 1<sup>st</sup> Class, Islamabad-West, whereby suit for specific performance filed by the respondent No.1 was decreed while suit for cancellation of the agreement to sell filed by the appellant was dismissed.

2. Relevant facts, essential for adjudication of the appeals are that the appellant and respondent No.1 entered into an agreement to sell dated 02.12.2013, Ex.P1, (**'the agreement'**) regarding sale of unit/plaza bearing No.3-C Babar Plaza, Sector I-10 Markaz Islamabad (**'the premises'**) against sale consideration of Rs.5,75,00,000/-.

The appellant received sum of Rs.10-Million as earnest money and the date for completion of the said transaction was fixed as 30.03.2014. It was stipulated in the agreement that possession of the unit is handed over to the respondent No.1. Record further reveals that out of remaining sale consideration, the respondent No.1 on 20.01.2014, paid amount of Rs.7-Million and another amount of Rs.5-Million to the appellant vide pay order dated 06.02.2014 and in this way, the outstanding sale consideration had been to the tune of Rs.355,00,000/-. On 07.04.2014, the respondent No.1 filed a suit for specific performance of the agreement against the appellant along with decree for possession of remaining portion of unit/plaza side by side permanent injunction.

3. The appellant besides contesting the suit of respondent No.1, filed a separate suit for cancellation of the agreement against the respondent No.1. Both the suits were consolidated and decided vide impugned consolidated judgment in terms noted in para-1 above.

4. Learned counsel for the appellant contended that no amount was available with the respondent No.1 in pursuance of the agreement; that it was informed in the Jirga to the respondent No.1 that due to non-fulfillment of his part of the agreement, the same is cancelled; that no portion of plaza was handed over to the respondent No.1, therefore, impugned judgment is liable to be set aside.

5. Learned counsel for the respondent No.1 argued that *bonafide* on the part of respondent no.1 is evident from the record that when appellant failed to fulfill his commitment regarding transfer of the premises in favour of respondent

No.1 on 30.03.2014, he immediately filed suit on 07.04.2014, within one week after elapse of time period mentioned in the agreement; that agreement is admitted and some portion/flats of the plaza is also in possession of the respondent No.1, suit has rightly been decreed by the learned trial Court.

6. Heard the learned counsel for the parties and examined the record with their able assistance.

7. The judicial examination of record reveals that payment of Rs.220,00,000/- by the respondent to the appellant pursuant to the agreement is an admitted fact. The last date for completion of the transaction as mentioned in the agreement was 30.03.2014 while suit for specific performance was filed on 07.04.2014. Needless to mention that in a suit for specific performance, the law has been settled that amount should be available with the plaintiff. It is matter of record that first order by the learned trial court is dated 19.05.2015 when application under Order XXXIX Rule 1&2 of the Code of Civil Procedure for temporary injunction filed by the respondent No.1 was allowed and thirty days' time was granted to respondent No.1 for deposit of balance sale consideration of Rs.355,00,000/- with the Nazir of the Court. In compliance of the order *ibid*, an amount of Rs.355,00,000/- was deposited on 15.06.2015 within the time granted/allowed by the learned trial Court.

8. Although an assertion has been made by the appellant that on 30.03.2014 required funds were not available with the respondent No.1 but nothing is available on record to substantiate that assertion which remained mere an

assertion. It is clearly available in the evidence when question was put to the PW-1 regarding existence of Jirga then answer was expressly made in negative. The relevant portion of the said evidence is reproduced as under:-

یہ عنایت ہے کہ مورخہ 31-3-14 کو میرے اور فریق دوم کے درمیان جرگہ ہوا تھا جس میں نثار، بابر خان، صفدر خان، اظہار الحق نیازی اور تیمور عباسی اور دیگر ایک دو افراد۔ یہ شریک ہوئے تھے۔ یہ عنایت ہے کہ میں نے روبرو جرگہ مورخہ 31-3-14 بوقت تین بجے دن تک بات تسلیم کر لی تھی کہ مجھ سے بمطابق معاہدہ مورخہ 30-3-14 جملہ رستم ادانہ ہو سکی

9. The law on the subject is the Specific Relief Act, 1877 ('Act of 1877'), as reveals through its preamble, is not meant to authorize the Court to direct the parties to perform any new action rather it is for to bind the parties to do an act/performance obligation for which they had bind themselves with their free will through solemn affirmation by an undertaking. When any of the parties to the said solemn affirmation and admitted agreement, expressed reluctance, then Act of 1877, held entitled the aggrieved party to sue the defaulting one before the Court of plenary jurisdiction.

10. In the present case, parties through agreement entered into solemn affirmation that on certain terms and conditions appellant would alienate premises to the respondent. When the former, on the date fixed, failed to abide by his commitment, the latter resorted civil action and court extended specific relief in his favour which, in the backdrop of the facts of the instant case, appears to be in accordance with the cannons of law.

11. In a /is initiated under the Act of 1877, normal course which a Court adopts, is to examine each and every detail qua agreement/settlement inter-se the parties besides claim

and counter-claim thereto with actions performed or omitted to perform and then to award appropriate relief. For the functions to be performed by a court, as equitable remedy, there are some guiding principles/maxims and amongst those guiding principles/maxims on the subject one of the same is that '**equity looks to the intention and not to the form**'.

12. In the case-at-hand , there is no issue of form but, of course is of the intention. To assess/gauge the intention behind an act, performed or omitted to perform, certain factors are required to be looked into. The acts performed by the respondent pursuant to the agreement includes:-

- i. Paid Rs.10-Million on 02.12.2013 through pay order which is admitted one.*
- ii. Outstanding amount of Rs.47,500,555/- had to be paid till 30.03.2014 but on the request of appellant, respondent paid Rs.12,000,000/- out of the outstanding amount prior to the time stipulated for payment which is also admitted one.*
- iii. The target date for the payment of outstanding amount was 30.03.2014 and when according to respondent, appellant refused to receive remaining sale consideration, former filed the suit within seven days of the refusal with readiness to pay the outstanding amount which is borne out of record.*
- iv. On the direction of the Court, the respondent deposited the outstanding amount within the stipulated period, also borne out of record.*

13. Having assessed the acts done/performed, this Court is of the firm view that the respondent had the intention to complete the already consented act under the agreement. He was, thus rightly held entitled to discretionary relief under the Act of 1877. The conclusion arrived at by the learned lower court is neither perverse nor arbitrary rather

is in consonance with the law on the subject i.e. the Act of 1877.

14. This Court is of the definite view that, undoubtedly remedy of specific performance is an equitable remedy. When suitor resorts to avail said equitable remedy then court exercises its jurisdiction by way of discretion and not in an arbitrary manner, because equitable jurisdiction is discretionary and not arbitrary. Said discretion must be exercised in accordance with fair play and judicial principles guided by sound reasoning. When trial court exercises its discretion in a way, that entire evidence is well appreciated, conduct of the parties is evaluated, material on record is considered in accordance with set principles of law, in that event Appellate Court is required to not interfere in the discretion exercised by the trial Court. The guiding principle for interference in the exercise of discretion of trial Court is that, when learned trial Court has exercised said jurisdiction perversely, arbitrary or against judicial principles. Appellate Court should also not exercise its discretion against the grant of specific performance on extraneous consideration.

15. The suit filed by the appellant for cancellation of document was merely an attempt, an afterthought to counter the claim of the respondent No.1. Said suit had been filed on 10.06.2015 more than one year and two months even after the filing of the suit of the respondent No.1. There is no material except a suit that said agreement was cancelled. Evidence of the parties have been examined carefully, nothing is available on record which could lead towards framing the view that stance of the appellant is corroborated and substantiated by any tangible piece of evidence.

16. After evaluation of the available material, it is definite conclusion of the Court that claim of the appellant to countermand the impugned judgment is not supportive from the material available on record. Discretion exercised by the learned trial Court seems neither arbitrary nor perverse.

17. In view of above, it is held that the findings of the learned trial Court qua the claim of the appellant and that of respondent No.1 *viz a viz* the agreement are based upon correct appreciation of evidence on record besides the law on the subject, therefore, do not call for any interference. Consequently, both the appeals fail and are accordingly **dismissed**. As a corollary, the criminal original 180/2020 warrants no further proceedings and **disposed of**.

**(MOHSIN AKHTAR KAYANI) (FIAZ AHMAD ANJUM JANDRAN)**  
**JUDGE JUDGE**

Imran

Announced in open Court on **27.01.2021.**

**JUDGE**

**JUDGE**

Approved for reporting.