

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

R.F.A.No.78/2013  
Mst. Sara Bibi  
**Versus**  
Muhammad Saleem and others

<b>Date of Hearing:</b>	17.09.2018
<b>Appellant by:</b>	Mr. Shakir Javed, Advocate for the appellant in R.F.A.No.78/2013 and for respondent No.2 in R.F.A.No.26/2016
<b>Respondents by:</b>	M/s Mir Bashir Ansari and Muhammad Atif Khokhar, Advocates for respondent No.1 in R.F.As No.78/2013 and 26/2016, Mr. Tahir Mehmood Abbasi, Advocate for respondents No.2 to 5 in R.F.A.No.78/2013 and for the appellants in R.F.A.No.26/2016.

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**MIANGUL HASSAN AURANGZEB, J:-** Through this judgment, we propose to decide regular first appeals No.78/2013 and 26/2016, since they entail common questions of law and fact.

2. Through consolidated judgment and decree dated 26.03.2013, the Court of the learned Civil Judge, Islamabad, decreed (i) suit No.589 for specific performance of oral agreement to sell dated 30.10.2000 and permanent injunction, titled “Muhammad Saleem Vs. Mst. Rehmat Jan etc.,” subject to the deposit of Rs.12,50,000/- by the plaintiff in the said suit, and (ii) suit No.588 for declaration and cancellation of registered sale deed No.6255, dated 19.10.2006, titled “Muhammad Saleem Khan Vs. Azmat Ali etc.”

3. Through R.F.A. No.26/2016, the appellants (who are the legal heirs of Jahandad Khan) impugn the said judgment and decree dated 26.03.2013, whereby suit No.589 was decreed, whereas through R.F.A. No.78/2013 the appellant, Sara Bibi, impugns the said judgment and decree dated 26.03.2013, whereby suit No.558 was decreed.

4. Muhammad Saleem, the plaintiff in civil suits No.589 and 558 shall hereinafter be referred to as “respondent No.1”. Hafiz Azmat Ali Khan son of Jahandad Khan, who is appellant No.1 in

R.F.A. No.26/2016 and respondent No.2 in R.F.A. No.78/2013, shall hereinafter be referred to as “Azmat Ali”.

5. On 30.10.2000, Jahandad Khan and respondent No.1 entered into an oral agreement, whereby the former agreed to sell to the latter two commercial units each comprising one basement, one shop and one flat in Chand Plaza, G-9 Markaz, Islamabad (“the suit properties”) for a total sale consideration of Rs.21,00,000/-. It is admitted that an amount of Rs.8,50,000/- was paid by respondent No.1 in installments. On 23.04.2002, respondent No.1 instituted suit No.589 for specific performance of the said oral agreement. The position taken by respondent No.1 was that the seller/Jahandad Khan had refused to receive the remaining sale consideration and transfer the suit properties to respondent No.1. Jahandad Khan died during the pendency of the said suit. The position taken by Jahandad Khan and/or his legal heirs was that since respondent No.1 did not pay the remaining sale consideration, the agreement stood cancelled and Rs.8,50,000/- paid by respondent No.1 stood forfeited. During the pendency of the said suit, the legal heirs of Jahandad Khan sold the suit properties to Mst. Sara Bibi (who is the appellant in R.F.A. No.23/2013) and Mst. Sarwar Sultan through registered sale deed No.6255, dated 19.10.2006. On 06.03.2007, respondent No.1 filed suit No.588 for the cancellation of the said deed. The learned Civil Court decreed the said suits, vide consolidated judgment and decree dated 26.03.2013, which has been impugned in the instant appeals.

**CONTENTIONS OF THE LEARNED COUNSEL FOR THE APPELLANTS IN R.F.A.NO.26/2016:**

6. Learned counsel for the appellants in R.F.A.No.26/2016, after narrating the facts leading to the filing of the appeal, submitted that admittedly, on 30.10.2000, an oral agreement was entered into whereby Jahandad Khan, the predecessor of the said appellants, agreed to sell the suit properties to respondent No.1 for a total sale consideration of Rs.21,00,000/-; that out of the said amount, respondent No.1 paid an amount of Rs.8,50,000/- in installments; that since respondent No.1 did not

have the funds for the purchase of the suit properties comprising two commercial units, on 06.04.2001, the said agreement was novated so as to make the agreement only for the sale of Unit No.2; that respondent No.2 did not even pay the entire sale consideration of Rs.10,50,000/- for Unit No.2; that on account of respondent No.1's said default, the appellants' predecessor cancelled the agreement and forfeited Rs.8,50,000/- that had been paid by respondent No.1; and that the alleged payment of Rs.5,00,000/- by respondent No.1 to Ashraf Lodhi in order to gain possession of a portion of the suit properties has been correctly held by the learned Civil Court as not forming part of the payment towards the sale consideration for the suit properties.

7. Learned counsel for the said appellants further submitted that respondent No.1 had filed a suit for specific performance only to embroil Jahandad Khan in unnecessary litigation; that respondent No.1 has been enjoying possession of a substantial portion of the suit properties since 2001; that respondent No.1 was not entitled to a decree for specific performance since he did not pay the remaining sale consideration within the time fixed in the order dated 18.02.2003, passed by the learned Civil Court; that such failure establishes the fact that respondent No.1 did not have the funds for the payment of the remaining sale consideration; that respondent No.1 had not even paid the entire sale consideration of Rs.10,50,000/- for Unit No.2; and that the impugned judgment and decree passed by the learned Civil Court is contrary to the law laid down by the superior Courts. Learned counsel for the said appellants prayed for the appeal to be allowed and for the impugned judgment and decree to be set-aside.

**CONTENTIONS OF THE LEARNED COUNSEL FOR THE APPELLANT IN R.F.A. NO.78/2013:**

8. Learned counsel for the appellant in R.F.A.No.78/2013 submitted that during the pendency of suit No.589, Mst. Sarwar Sultan and the appellant (Mst. Sara Bibi) purchased the suit properties from the legal heirs of Jahandad Khan through registered sale deed No.6255, dated 19.10.2006; that there was

no injunctive order in the field when the said sale took place; that after the said sale, respondent No.1 impleaded Mst. Sarwar Sultan and the appellant as defendants in suit No.589; that on 06.03.2007, respondent No.1 filed civil suit No.588 for the cancellation of the said sale deed; that since there was no embargo on the sale of the suit properties during the pendency of civil suit No.589, the learned Civil Court erred by decreeing civil suit No.588 against Mst. Sarwar Sultan and the appellant; that the appellant was a *bona fide* purchaser of the suit properties for value without notice of the dispute between the legal heirs of Jahandad Khan and respondent No.1; and that Mst. Sarwar Sultan and the appellant had also filed civil suit No.176/2009 against respondent No.1 and his son for possession of Unit No.1 but the plaint in the said suit was rejected by the learned Civil Court, vide order dated 07.12.2012. Learned counsel for the said appellant prayed for the appeal to be allowed and for the impugned judgment and decree to be set-aside.

**CONTENTIONS OF THE LEARNED COUNSEL FOR RESPONDENT NO.1:**

9. Learned counsel for respondent No.1 submitted that Jahandad Khan and/or his legal heirs had admitted receipt of Rs.8,50,000/- as part of the sale consideration from respondent No.1; that Rs.5,00,000/- paid by respondent No.1 to Ashraf Lodhi in order to obtain possession of a portion of the suit properties was part of the sale consideration; that time was not of the essence for the performance of the oral agreement dated 30.10.2000; that at all material times, the agreement was for the sale of both Units No.1 and 2; that the agreement to sell dated 30.10.2000 had not been novated at any material stage; that respondent No.1 had been forced to sign receipt dated 06.04.2001 (Exh.P-4); that even though on 06.04.2001, Jahandad Khan was alive, the receipt for the payment of Rs.1,50,000/- was signed by Azmat Ali who was not the owner of the suit properties at that time; that respondent No.1 purchased stamp papers for the execution of the sale deed with respect to the sale

properties; that respondent No.1 filed a suit for specific performance after Jahandad Khan refused to execute his part of the transaction; and that the eviction petition filed against respondent No.1 was dismissed up to the Hon'ble High Court.

10. Learned counsel for respondent No.2 further submitted that respondent No.1 also published advertisements in the newspapers clearly stating therein that the suit properties were the subject matter of litigation; that during the pendency of the suit instituted by respondent No.1, the suit properties were sold by the legal heirs of Jahandad Khan through a registered sale deed; that one of the purchasers *pendente lite*, namely, Mst. Sarwar Sultan, entered into a settlement with respondent No.1; that out of the suit property, respondent No.1 is in possession of one shop, one flat and two basements since 11.03.2001; that possession of one flat in Unit No.2 is with Sajid Iqbal; that respondent No.1 was not aware about any interim order passed by the learned Civil Court stipulating a time period for the deposit of the remaining sale consideration; that the non-deposit of the remaining sale consideration within the time period fixed by the learned Civil Court only had the consequence of interim relief not being granted to respondent No.1; that such non-deposit would have no bearing on respondent No.1's entitlement to a decree for specific performance of the oral agreement dated 30.10.2000; that respondent No.1 had always been ready, willing and able to pay the remaining sale consideration but Jahandad Khan had backed out from the deal; and the impugned judgment and decree passed by the learned Civil Court is strictly in accordance with the law and does not suffer from any legal infirmity. Learned counsel for respondent No.1 prayed for the appeals to be dismissed.

11. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

12. As mentioned above, through oral agreement dated 30.10.2000, Jahandad Khan agreed to sell the suit properties to respondent No.1 for a total sale consideration of Rs.21,00,000/-.

The said oral agreement is reflected in the receipt dated 30.10.2000 (Exh.P-1) for earnest money amounting to Rs.2,50,000/- executed on plain paper by Jahandad Khan and respondent No.1, and witnessed by Azmat Ali (son of Jahandad Khan) and Muhammad Naeem Khan (son of respondent No.1).

13. On 03.01.2001, Azmat Ali issued a receipt (Exh.P-2), wherein the execution of the said oral agreement and receipt of the earnest money had been acknowledged. Furthermore, it was also acknowledged that on 03.01.2001, a further amount of Rs.2,00,000/- has been received as part of the sale consideration; and that the balance sale consideration would be paid by 20.01.2001.

14. On 21.01.2001, Azmat Ali issued a receipt (Exh.P-3) for the payment of Rs.1,00,000/- by respondent No.1 as part of the sale consideration for the suit properties. It was also acknowledged by Azmat Ali that by 21.01.2001, a total amount of Rs.5,50,000/- had been received as part of the sale consideration for the suit properties.

15. The document produced as (Exh.P-4) is a curious document. This document is an acknowledgment by Azmat Ali of having received Rs.1,50,000/- on 06.04.2001 for Unit No.2. As per the contents this document, Rs.7,00,000/- is said to have been received from respondent No.1 for Unit No.2. This document also shows that since an amount of Rs.7,00,000/- had been received out of the total payable amount of Rs.10,50,000/-, the balance amount came to Rs.3,50,000/-, which was payable at the time of the registration of the sale deed. In this document, Rs.3,50,000/- is stated to be the remaining sale consideration in letters as well as words. It is an admitted position that respondent No.1 has been in possession of one shop, one flat and two basements ever since the year 2001.

16. After disputes and differences arose between the said parties, respondent No.1, on 23.04.2002, filed suit No.589 for specific performance and permanent injunction against Jahandad Khan and Azmat Ali before the Court of the learned Civil Judge, Islamabad. In the said suit, the position taken by

respondent No.1 was that out of the total sale consideration of Rs.21,00,000/-, an amount of Rs.8,50,000/- had been paid to the said defendants; Rs.5,00,000/- was paid to one Ashraf Lodhi in order to obtain possession of Unit No.2 from him; and Rs.18,545/- was paid by respondent No.1 against the outstanding utility bills. In the prayer-clause, respondent No.1 prayed for a decree for specific performance of the agreement dated 30.10.2000, and a direction to the defendants to receive Rs.7,31,455/- as the remaining sale consideration for the suit properties. During the pendency of the said suit, Jahandad Khan passed away, whereafter his legal heirs were impleaded as the defendants in the said suit.

17. In the written statement filed prior to Jahandad Khan's demise, it was admitted that an agreement for the sale of the suit properties for a total sale consideration of Rs.21,00,000/- had been entered into between Jahandad Khan (seller) and respondent No.1 (purchaser). The receipt of Rs.8,50,000/- as part of the sale consideration was also admitted. However, it was pleaded *inter-alia* that the parties had, on 06.04.2001, agreed to exclude Unit No.1 from the sale transaction. The position taken in the said written statement was that respondent No.1 had failed to pay the balance sale consideration of Rs.2,00,000/- for Unit No.2.

18. During the pendency of the said suit, the legal heirs of Jahandad Khan sold Unit No.1 to Mst. Sarwar Sultan and Mst. Sara Bibi through a registered sale deed No.6255, dated 19.10.2006. After coming to know about the said sale, respondent No.1 impleaded Mst. Sarwar Sultan and Mst. Sara Bibi as defendants in the said suit. Furthermore, on 06.03.2007, respondent No.1 filed suit No.588 for declaration and cancellation of the said registered sale deed. The position taken by Mst. Sarwar Sultan and Mst. Sara Bibi in their written statement dated 07.06.2007 was that they were *bona fide* purchasers of the suit properties without notice or knowledge as to the deal as well as the litigation between respondent No.1 and Jahandad Khan or his legal heirs.

19. Vide order dated 17.11.2012, the learned Civil Court consolidated civil suit No.589 and civil suit No.588. On 08.12.2012, the following consolidated issues were framed:-

- “1. *Whether the predecessor in interest of defendant No.1 to 4 Haji Jehandad deceased entered into an agreement to sell regarding the suit property for total sale consideration of Rs.21,00,000/- to plaintiff and had received Rs.2,50,000/- as earnest money (on 30.10.2000) at the time of execution of agreement? OPP*
2. *Whether the defendant No.2 Haji Azmat Ali (son of Haji Jehandad (deceased) has received Rs.2,00,000/- from the plaintiff on behalf of Haji Jehandad deceased and issued receipt dated 01.03.2001? OPP*
3. *Whether the defendant No.2 (Haji Azmat Ali) received another amount of Rs.1,00,000/- from plaintiff on 21.1.2001? OPP*
4. *Whether the predecessor in interest of defendant No.1 to 4 namely Haji Jehandad deceased and defendant No.2 (Azmat Ali) received Rs.3,00,000/- from plaintiff, hence total amount of Rs.8,05,000/- had been received by the defendants? OPP*
5. *Whether the plaintiff had paid a sum of Rs.5,00,000/- to one Ashraf Lodhi, the possessor of disputed property with the consent of predecessor in interest of defendants Nos. 1 to 4 Haji Jehandad and defendant No.2 (Azmat Ali) and obtain the possession of shop No.2, basement No.2 and flat? OPP*
6. *Whether the alienation of some portion of suit property by defendant No.1 to 4 in favour of defendant No.5 and 6 during pendency of the suit is illegal, ineffective upon the rights of plaintiff and liable to be cancelled? OPP*
7. *If all the above issues are proved in affirmative, then whether the plaintiff is entitled for decree for specific performance of the agreement alongwith permanent injunction as prayed for? OPP*
8. *Whether the defendant Nos.1 to 4 have executed a registered sale deed No.6255 dated 19.10.2006 in favour of defendant No.5 & 6 by committing the violation, fraud, cheating and misrepresentation of facts and pending litigation between the parties and plaintiff is entitled for decree for declaration and permanent injunction as prayed for? OPP*
9. *Whether the sale deed executed in violation of fact and law? OPP*
10. *Whether the registered sale deed registered dated 19.10.2006 is liable to be cancelled? OPP*
11. *Whether the plaintiff is estopped by his words and conduct to file the instant suits? OPD*
- 11-A. *Whether the suits of plaintiff is based on verbal agreement between plaintiff and predecessor in interest of defendant No.1 to 4 and plaintiff has no locus standi to file the instant suit? OPD 1 to 4*
12. *Whether the plaintiff could not pay the remaining sale consideration within stipulated period and asked the defendant No.1 to 4 to abundant all of the rights, hence*



*same was sold by the defendant No.1 to 4 to other defendants, if so, its effect? OPD 1 to 4*

- 12-A. Whether the defendant No.5 and 6 are bonafide purchaser of portion of suit property for value without notice? OPD 5 & 6*
- 13. Whether the plaintiff has no cause of action or locus standi to file the suit? OPD*
- 14. Whether the defendants are entitled to get special costs? OPD*
- 15. Whether the suit of the plaintiff is false, frivolous and vexatious liable to be dismissed? OPD*
- 16. Relief.”*

20. Respondent No.1 gave evidence as PW-1. Azmat Ali appeared as DW-1, whereas Abdul Rasheed, who was the special attorney of Mst. Sara Bibi, appeared as DW-2.

21. Respondent No.1, in suit No.589, claims that at all material times the deal was for the suit properties (i.e., Units No.1 as well as No.2), whereas the sellers took the position that after issuance of the receipt dated 06.04.2001 (Exh.P-4), the deal was only for Unit No.2. The vital question that needs to be determined is whether, after the issuance of (Exh.P-4), the deal can be said to be for the two suit properties or only Unit No.2.

22. The receipt (Exh.P-4) shows that on 06.04.2001, an amount of Rs.1,50,000/- was paid by respondent No.1 to Azmat Ali; and that a total amount of Rs.7,00,000/- (including the said Rs.1,50,000/-) had been paid by respondent No.1 as part of the sale consideration for Unit No.2. This receipt also shows that the balance amount payable by respondent No.1 for Unit No.2 was Rs.3,50,000/-. After this, there is no other receipt on the record showing that a further amount of Rs.1,50,000/- had been paid. Be that as it may, the defendants, in their written statement, filed on 08.10.2002, have pleaded that respondent No.1 had been asked to pay the balance amount of Rs.2,00,000/- and get Unit No.2 transferred in his name. The said written statement is an acknowledgment by Jahandad Khan and Azmat Ali as to the receipt of Rs.8,50,000/-.

23. Now, Respondent No.1 gave evidence as PW-1 and in his cross-examination, he deposed that he was forced to sign receipt dated 06.04.2001 (Exh.P-4). There is no pleading to the said effect in respondent No.1's suit for specific performance.

Respondent No.1's said stance, in his cross-examination, is a clear departure from his pleadings in the said suit, and therefore, same cannot come to his aid. At no material stage, did respondent No.1 institute a suit for the cancellation of the said receipt. Furthermore, this testimony is reflective of respondent No.1's attempt to concoct a story in order to defeat the seller's plea that through the said Exh.P-4, the oral agreement to sell dated 30.10.2000, stood novated and was to continue only with respect to Unit No.2. Respondent No.1's said testimony casts a doubt over the rest of his testimony not supported by any documentary evidence. For instance, respondent No.1's deposition that prior to the institution of the suit, Jahandad Khan had backed out from the deal; and that the balance sale consideration of Rs.12,50,000/- was available with respondent No.1 prior to the institution of the suit.

24. Since Exh.P-4 was produced by respondent No.1 during his examination-in-chief, he cannot take a position inconsistent with its contents. Exh.P-4 clearly provides that a total amount of Rs.7,00,000/- had been received out of the total sale consideration of Rs.10,50,000/- for Unit No.2; and that Rs.3,50,000/- remained to be paid by respondent No.1. There is no mention of any amount having been received as consideration for Unit No.1. In any case, the admitted position is that prior to the institution of the suit, an amount of Rs.8,50,000/- had been paid by respondent No.1 to Jahandad Khan and/or his son, Azmat Ali. This amount is not even the complete consideration for Unit No.2. Therefore, it can safely be concluded that Rs.8,50,000/- admittedly paid by respondent No.1 prior to the institution of the suit was not even the entire sale consideration for one of the units.

25. Respondent No.1, in his evidence, produced the stamp paper on which the sale deed was printed. This document was produced by respondent No.1 to demonstrate his readiness and willingness to perform his obligations under the agreement. This document was not signed either by respondent No.1 or Jahandad Khan. Perusal of this document shows that the

agreement between the said parties was only for Unit No.2 and the total sale consideration was Rs.10,50,000/-. There is no mention of Unit No.1 in this document. The contents of this document produced by respondent No.1 belies his own version taken in the suit that the agreement at all material times was for the suit properties (i.e. Unit No.1 as well as Unit No.2). It corroborates and strengthens the position taken by the appellants in R.F.A. No.26/2016 that the oral agreement dated 30.10.2000 was novated on 06.04.2001, whereafter the agreement was with respect to Unit No.2 only. Where a purchaser includes property (which had not longer remained the subject matter of the agreement to sell) in the plaint seeking its sale by way of specific performance of the agreement, he cannot be considered to be a person who is willing to perform his part of the contract. By adding Unit No.1 in his suit for specific performance, respondent No.1 made a change in the essential conditions of the agreement and thus his conduct had rendered him disentitled to specific performance of the agreement. The contradictory position taken by respondent No.1 is an added reason why the learned Civil Court ought to have denied the relief of specific performance to respondent No.1.

26. As mentioned above, the receipt dated 06.04.2001 (Exh.P-4) shows that the total price of Unit No.2 was Rs.10,50,000/-. Since respondent No.1 had only paid Rs.8,50,000/-, an amount of Rs.2,00,000/- was still outstanding out of the sale consideration for Unit No.2. Respondent No.1 tried to include Rs.5,00,000/- alleged to have been paid to Ashraf Lodhi in order to obtain possession of portions of the suit properties as part of the sale consideration. The learned Civil Court, while deciding issue No.5, has held that the said amount cannot be treated as part of the sale consideration. We have been given no reason by the learned counsel for respondent No.1 to interfere with the said finding of the learned Civil Court.

27. A suit for specific performance of contract provides for a discretionary remedy. The relief of specific performance being discretionary, conduct of the plaintiff also assumes importance.

The plaintiff in such a suit must demonstrate that he has been ready, willing and able to perform his part of the contract throughout the proceedings till the date of the decree and if, prior to that, he negatives his readiness, willingness or ability to perform his part of the contract by his conduct, he cannot claim specific performance of the contract. "Readiness" denotes the capacity of a purchaser to purchase the land while the word "willingness" denotes his conduct. A plaintiff seeking the benefit of specific performance of a contract must manifest that his conduct has been without a blemish throughout, entitling him to the specific relief. The factum of his readiness, willingness and ability to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances.

28. Now, along with suit No.589, respondent No.1 had filed an application for interim injunction. Vide order dated 18.02.2003, the learned Civil Court allowed the said application subject to the deposit of Rs.12,50,000/- in the Court account within a period of thirty days, failing which the petition was to stand dismissed. It is an admitted position that the said amount was not deposited by respondent No.1. Respondent No.1's failure to deposit the said amount in the Court is indicative of his inability and unwillingness to comply with his obligation under the agreement.

29. It appears that in the year 2010, respondent No.1 filed another application for interim injunction. Vide order dated 21.07.2010, the learned Civil Court dismissed the said application primarily on the ground that respondent No.1 had not fulfilled the condition of the deposit of Rs.12,50,000/- in the order dated 18.02.2003, whereby respondent No.1's application for interim injunction had been conditionally allowed. Respondent No.1's appeal against the said order dated 21.07.2010 was dismissed by the learned appellate Court, vide order dated 09.01.2013.

30. As regards respondent No.1's stance that he was not aware of the order dated 18.02.2003, the same is not believable simply for the reason that every litigant, especially a plaintiff, is

presumed to be aware of the contents of the orders passed in the suit. It is not denied that the application for injunction had been filed by respondent No.1. For him to take a plea that he was not aware of the orders passed on his application strips him of *bonafides*.

31. Section 22 of the Specific Relief Act, 1877, states that the jurisdiction to decree specific performance is discretionary and a Court is not bound to grant such relief merely because it is lawful to do so. Section 22 also provides that 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 expression *“and the Court is not bound to grant such relief merely because it is lawful to do so”*, following the words *“the jurisdiction to decree specific performance is discretionary”* makes the position clear that even if it is lawful to decree specific performance, the court need not do so, if on exercising the discretion in the manner indicated in Section 22 *ibid* the court comes to the conclusion that discretion is to be exercised not to decree specific performance. Equitable considerations are most relevant in the realm of exercise of discretion. The exercise of discretion cannot be arbitrary but sound and reasonable, guided by judicial principles and in consonance with principles of justice, equity and good conscience. The Court has to consider all the facts and circumstances of the case in order to exercise the discretion to decree or not to decree specific performance and in that process could take into account the parties’ conduct. Since in granting specific performance the Court acts in equity, it becomes necessary that a high standard of equitable conduct must be displayed by the plaintiff. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances.

32. Furthermore, Section 24(b) of the Specific Relief Act, 1877, provides that specific performance of a contract cannot be

enforced in favour of a person who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed. By not depositing the remaining sale consideration in the Court within a month of the said order dated 18.02.2003, respondent No.1, by such conduct brought himself within the mischief of the said Section, and thereby disintitiled himself from the equitable relief of specific performance.

33. We are not impressed with the contention of the learned counsel for respondent No.1 that failure on respondent No.1's part to deposit Rs.12,50,000/-, after the said order dated 18.02.2003 was passed by the learned Civil Court would have no bearing on the merits of his suit; and that such failure would only result in interim relief not being granted to him. We are of the view that such conduct/failure on respondent No.1's part not just renders him undeserved of equitable relief but is also reflective of his intention to embroil the sellers in wasteful litigation. Any plaintiff/purchaser, with any modicum of sense or good faith, would demonstrate his good intentions by showing compliance with an order to deposit the remaining sale consideration in the Court, unless of course he does not have the amount so as to make such a deposit. It is our view that this failure on respondent No.1's part was ample ground for the dismissal of the said suit. In holding so, we derive guidance from the law laid down in the following judgments:-

- i. In the case of Haji Abdul Hameed Khan Vs Ghulam Rabbani (2003 SCMR 953), it was held that where the plaintiff, in a suit for specific performance of an agreement to sell, does not deposit the balance sale consideration amount within the time fixed by the trial Court, the suit was liable to be dismissed. Furthermore, it was held that a plaintiff seeking the equitable remedy of specific performance must always be ready and willing to perform his part of the contract. If the plaintiff does not deposit the balance sale consideration amount within the time stipulated by the trial

Court, the presumption would be that the plaintiff was not serious in prosecuting his remedy.

- ii. In the case of Adil Tiwana and others Vs Shaukat Ullah Khan Bangash (2015 SCMR 828), the plaintiff had failed to pay the balance sale consideration within the period specified in the agreement to sell. Even when the suit for specific performance was filed, the plaintiff did not seek to deposit the balance sale consideration in the Court. The direction of the trial Court to the plaintiff to deposit Defence Saving Certificates, for an amount equal to the balance sale consideration, within a period of one month, was also not complied with by the plaintiff. In the ultimate analysis, the plaintiff had failed to comply with the orders/directions of the trial Court despite several opportunities. In such circumstances, the plaintiff's suit for specific performance was held to have been correctly dismissed. In the said judgment, the Hon'ble Supreme Court made the following observations:-

*"...We may also add at this stage that the remedy by way of specific performance is equitable and it is not obligatory on the Court to grant such a relief merely because it is lawful to do so. Section 22 of the Specific Relief Act expressly stipulates so. It is axiomatic that one who seeks equity must do equity. In the present case all equities are squarely in favour of the appellants/defendants and stacked high against the respondent/plaintiff."*

- iii. In the case of Muhammad Iqbal Vs. Mehboob Alam (2015 SCMR 21), a suit for specific performance of an agreement to sell was held to have been correctly decreed, because the plaintiff had deposited the balance sale consideration in the Court. Even though the plaintiff in the said case had subsequently withdrawn the amount deposited in the Court, the earlier deposit of the balance sale consideration had established his *bonafides*.
- iv. Recently, in the case of Hamood Mehmood Vs. Mst. Shabana Ishaque (2017 SCMR 2022), the Hon'ble Supreme Court has held as follows:-

*“3. It is mandatory for the person whether plaintiff or defendant who seeks enforcement of the agreement under the Specific Relief Act 1877, that on first appearance before the Court or on the date of institution of the suit, it shall apply to the Court getting permission to deposit the balance amount and any contumacious/omission in this regard would entail in dismissal of the suit or decretal of the suit, if it is filed by the other side.”*

34. As for respondent No.1's plea that time was not of the essence for the performance of the oral agreement dated 30.10.2000, suffice it to say that even if it is so assumed, given the fact that the suit properties are commercial in nature, the balance sale consideration could not be held to have been payable as and when it took respondent No.1's fancy. Gone are the days when, with respect to agreements for the sale of immovable properties, time was generally held not to be of the essence. In the case of Muhammad Abdur Rehman Qureshi Vs. Sagheer Ahmed (2017 SCMR 1696), even though time was held not to be of the essence for the performance of an agreement to sell an immovable property, the Hon'ble Supreme Court, set-aside the concurrent judgments decreeing the suit for specific performance of such an agreement. The inequitable conduct of the institution of the suit for specific performance with an inordinate delay during which time the value of the suit property had substantially increased furnished the ground for setting-aside the decree for specific performance. Paragraph-9 of the said report, is reproduced herein below:-

*“9. As far as the argument of learned counsel for the appellant that time was of the essence of the contract is concerned, we do not find ourselves in agreement with him for the reason that admittedly time for execution of the sale deed was extended on a number of occasions and at least on a few of the said occasions it was on the request of the appellant. However, in view of the commercial nature of the property business and a widespread trend of rapid increase in prices of immovable properties, a seller cannot be left at the mercy of the buyer to bind him in an agreement to sell and then delay completion of the contract for as long as he may wish hiding behind an archaic legal principle that in contracts involving immovable properties, time is generally not of the essence. This rule was settled many centuries ago when prices of real estate remained constant and stagnant for years on end. It is high time that this rule was revisited and revised keeping in view the changed circumstances and the ground realities of the real estate market.*



*In this day and age, on account of rapid increase in population demand for real estate has increased. Further, on account of various reasons better financial resources are available with prospective purchasers. Big investors have also entered the fray to take the benefit of growing demand for real estate. On account of increasing demand and limited supply, property prices rise rapidly, at times in a matter of months. Therefore, the aforesaid principle that in real estate transactions, time is not of the essence cannot indiscriminately be applied. It must be interpreted and applied specifically considering the facts and circumstances of each case to balance equities, keeping the standards of reasonability in mind and ensuring that injustice is not done to either side.”*

35. Through registered sale deed No.6255, dated 19.10.2006, the legal heirs of Jahandad Khan sold the suit properties to Mst. Sarwar Sultan and Mst. Sara Bibi. After coming to know about the said sale, respondent No.1, on 06.03.2007, filed suit No.588 for the cancellation of the said registered sale deed. As regards suit No.589 for specific performance and permanent injunction, respondent No.1 filed a second amended plaint, wherein Mst. Sarwar Sultan and Mst. Sara Bibi were impleaded in suit No.589 as respondents No.5 and 6, respectively.

36. The doctrine of “*lis pendens*” expressed in the maxim “*ut lite pendente nihil innovetur*” (during a litigation nothing new should be introduced) has been statutorily incorporated in Section 52 of the Transfer of Property Act, 1882. A sale *pendente lite* is hit the doctrine of *lis pendens*. Persons purchasing a suit property during the pendency of litigation cannot have their interests saved even though they are not parties to the proceedings and not heard by the Court concerned. The primary object of the principle of *lis pendens* is to maintain *status quo* and protect a litigant, who emerges successful, against the alienation of the suit property by his opponents during the pendency of a suit in which any right to such property is in question. The principle of *lis pendens* does not prohibit the transfer of the suit property *pendente lite* but the transferee acquires rights subject to the judgment/decreed passed by a Court in the pending suit. In holding so, we derive guidance from the law laid down in the cases of Muhammad Sharif Vs. Mst. Fateh (2004 SCMR 813), and Ibrahim Vs. Muhammad Hayat (2004

CLC 421) and Evacuee Trust Property Bond Vs. Liaqat Ali (2003 CLC 972).

37. There is no denying the fact that Mst. Sarwar Sultan and Mst. Sara Bibi purchased the suit properties during the pendency of suit No.589 for specific performance and permanent injunction. Whether or not they had knowledge of the said suit when the suit properties were purchased by them is immaterial. As long as the sale of a property which the subject matter of a pending suit is made *pendente lite*, the principle of *lis pendens* applies regardless of the fact whether there was any injunctive order in the field when such purchase was made. The plea of a *bonafide* purchaser of the suit property for value without notice does not in any manner offset or dilute the principle of *lis pendens*. The plea of *bonafide* purchaser without notice is not open to transferee *pendente lite*. In our opinion, therefore, the doctrine of *lis pendens* renders a transfer made during the pendency of the suit subservient to the rights of the plaintiff seeking specific performance of a prior contract entered into by the vendor in his favour, even though the subsequent transferee had obtained the transfer without notice of the prior contract. Reference in this regard may be made to the following case law:-

- (i) In the case of Industrial Development Bank of Pakistan Vs. Saadi Asmatullah (1999 SCMR 2874), it was observed that transfer of a property when litigation in respect of which was pending before the Court was to be governed by the provisions of section 52 of the Transfer of Property Act, which lays down that such transaction, made during pendency of litigation, cannot affect the rights of any other party to the litigation, which may be acquired by it under the decree passed by the Court. Furthermore, it was held as follows:-

*“Even a bona fide purchaser with consideration pendente lite would be bound by the result of the litigation as his rights in such property would be subject to the rights of the parties to the litigation as finally determined by the Court.”*

- (ii) In the case of Ram Peary Vs. Gauri (AIR 1978 Allahabad 318), the Full Bench of the Allahabad High Court referred to a decision in the case of Bellamy Vs. Sabine ((1857) 44 ER 842) wherein it was observed as under:-

*“It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party.*

*Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind required that the decision of the Court in the suit shall be finding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end.”*

- (iii) In the case of Basappa Vs. Bhimangowda (AIR 1928 Bombay 65), it was held that a transferee *pendente lite* is bound by decree and it is immaterial whether he had notice of pending proceedings or not.

38. In the case at hand, even if it is assumed that Mst. Sarwar Sultan and Mst. Sara Bibi were totally unaware of the agreement to sell dated 30.10.2000 between respondent No.1 and Jahandad Khan or the pendency of suit No.589, since the sale deed was executed on 19.10.2006 (i.e. during the pendency of suit No.589) they, as subsequent purchasers, would acquire rights subject to the judgment/decreed passed in the said suit. The learned Civil Court has held that since Mst. Sara Bibi's special attorney (DW-2) had deposed that at the time when the registered sale deed dated 19.10.2006 was executed, there was no injunctive order in the field the suit property was unencumbered, it was clear that Mst. Sara Bibi was well aware of the pendency of the litigation with respect to the suit properties. That may be so, but since the said sale was made *pendent lite*, it would be subject to the decree passed in the pending suit, i.e. suit No.589.

39. Now, at no stage prior to the institution of the suit for specific performance did respondent No.1 issue any notice to Jahandad Khan demanding the transfer of the suit properties upon payment of the balance sale consideration. Respondent No.1 appeared as PW-1 and admitted this fact. Furthermore, respondent No.1 did not file any application for the deposit of the remaining sale consideration before the learned Civil Court. This fortifies our view that the learned Civil Court erred by decreeing respondent No.1's suit for specific performance.

40. True, the petitions seeking respondent No.1's eviction from the portions of the suit properties in his occupation were dismissed by the Court of the learned Rent Controller, but this by itself would not make respondent No.1 the undisputed lawful owner of the suit properties. It is well settled that a Court of a Rent Controller does not have the jurisdiction to determine disputes as to title of the demised premises.

41. On the principles of law mentioned above and on the facts and circumstances emerging from the evidence on record, we are of the view that this is a fit case where the discretion should have been exercised not to decree respondent No.1's suit for specific performance. In the result, we allow R.F.A.No.26/2016 titled "Azmat Ali, etc. Vs. Muhammad Saleem". The judgment and decree dated 26.03.2013, passed by the learned Civil Court, is set-aside and respondent No.1's suit for specific performance and permanent injunction is dismissed. The appellants in R.F.A. No.26/2016 are directed to return Rs.8,50,000/- to respondent No.1 with simple interest at the rate of 8% per annum with effect from the date of the institution of suit No.589, i.e., 23.04.2002. Since respondent No.1 has admittedly been in possession of a substantial portion of the suit properties since 2001, we hold that he is not entitled to any further compensation.

42. The consequence of our judgment in R.F.A.No.26/2016 is that R.F.A.No.78/2013, titled "Mst. Sara Bibi Vs. Muhammad Saleem, etc.", is allowed. Since we have held that respondent No.1 was not entitled to a decree for specific performance of the oral agreement dated 30.10.2000, his suit for the declaration and

cancellation of the registered sale deed No.6255, dated 19.10.2006 is dismissed. The contesting parties shall bear their own costs.

(ATHAR MINALLAH)  
JUDGE

(MIANGUL HASSAN AURANGZEB)  
JUDGE

ANNOUNCED IN AN OPEN COURT ON \_\_\_\_\_/2018

(JUDGE)

(JUDGE)

Qamar Khan\*

APPROVED FOR REPORTING