

**IN THE SUPREME COURT OF PAKISTAN**  
 (Appellate Jurisdiction)

**PRESENT:**

MR. JUSTICE MUSHIR ALAM  
 MR. JUSTICE QAZI MUHAMMAD AMIN AHMAD

(AFR)(D.J)

**CIVIL PETITION NO.852 OF 2020**

Against the Order dated 23.12.2019 passed  
 by Lahore High Court, Lahore in Civil  
 Revision No.77548 of 2019

Muhammad Jamil & others

...Petitioner(s)

**VERSUS**

Muhammad Arif

...Respondent(s)

For the Petitioner(s): Ch. Ishtiaq Ahmad Khan, ASC

For Respondent No.1: Malik Muhammad Qayyum, Sr.ASC

Date of Hearing: 10.9.2020

**JUDGMENT**

**MUSHIR ALAM, J.**— Petitioners have impugned the judgment dated 23.12.2019 whereby concurrent judgment and decree of the learned Additional District Judge, Toba Tek Singh dated 27.11.2019 maintaining judgment and Decree passed by the learned *Civil Judge Pir Mahal* dated 7.02.2019 decreeing the Suit for specific performance, was maintained. By consent petition was heard at leave granting stage and being decided.

2. For ease and convenience, the appellant/vendor shall be referred to as the Defendant and the Respondent/vendee as the Plaintiff. Facts are that the Plaintiff, entered into an agreement to sell dated 26.03.2014 with the Defendants No.1 to 3 in respect suit property for a total sale consideration in foreign currency in the sum of Britain £ 2,17,000/- out of which £ 17,000 was paid in advance as earnest money. Balance sale consideration, was agreed will be paid at the time of the execution of sale deed, attestation of mutation and handing over of the possession on or before 15.4.2015. To ensure adherence to the time line for the performance of respective

obligations by the parties, the agreement also contained penal consequences for breach of agreement by either party.

3. Record shows that the Plaintiff on assertion that the Defendant refused to receive the balance sale consideration, on 14.3.2015 filed a suit for specific performance, in the *Civil Court, Pir Mahal*, a month before the cutoff date fixed for specific performance. Learned trial court, granted ad interim injunctive relief, subject to deposit of balance consideration by 28.3.2015 with a caution that on failure to deposit, *the ad-interim order, be deemed to be vacated*. Balance consideration, was not deposited rather, further time at his request was enlarged to 30.3.2015 with a similar caveat and the suit was adjourned to 11.4.2015.

4. It is matter of record that instead, of depositing balance sale consideration, as ordered by the *Civil Judge Pir Mahal*. The respondents on 1.4.2015 filed yet another suit in the Court of *Civil Judge Toba Tek Singh*. He managed to obtain ad-interim orders, without offering to deposit or seeking any directions of the court to deposit the balance sale consideration. On 11.4.2015 he withdrew the earlier suit, on the ground inter alia to remove some legal defects, from the court of *Civil Judge Pir Mahal*.

5. In the subsequent suit, stay application was contested and granted unconditionally, vide Order dated 02.11.17. On appeal, stay order was modified and subjected to deposit of the balance sale consideration within 120 days (four months), with a caveat, that on failure to deposit, injunction application would stand dismissed. It is matter of record that such order was not complied, yet the trial court granted 2 days' more time and later on the direction of Revision Court, amount in Pakistani currency was deposited in the treasury of the trial court on 02.10.18.

6. Suit after full dress trial was decreed, for specific performance vide judgment dated 07.02.19. Plaintiff was directed to receive back the balance consideration deposited in Pakistani Rupee

and, was given 30 days further time from to deposit the balance amount of £ 200,000 with the Court; the order was not complied.

7. The appeal filed by the Defendant was dismissed on and so also the Revision met the same fate, vide Orders dated 27.11.2019 and 23.12.19 respectively, on the assumption that the defendant carry an attitude of non-performance and the plaintiffs were ready and willing to perform their part of the contract. The Plaintiffs through impugned judgment was again directed to deposit £ 200,000 with the trial court within 30 days, if it has not been deposited earlier, which order, it is pointed out, has not been complied with. Concurrent Judgments of all the three courts below, have been impugned before us,

8. Learned counsel for the Defendant argued, that the sale agreement dated 26.3.2014 clearly set out the time for performance of reciprocal obligations by both the parties. Breach thereof by the respondents entailed penal consequence of forfeiture of earnest amount, likewise, refusal on the part of appellant to execute sale deed and effect mutation made him liable to return double the amount of earnest money and a right to seek legal remedy by the respondents, made time essence of the contract. Appellant argued that even before the cut off date, without offering the sale consideration to the appellant; Respondent with *malafide* intentions filed the Civil Suit in the Court of *Pir Mahal* and obtained interim injunction, which was subject to deposit the balance amount. It was urged, that the Respondent had no money to pay the balance sale consideration, he failed to deposit the balance amount, despite the direction of the trial court *Pir Mahal* and lastly when at his request time was enlarged by the trial Court on 28.3.2015 to deposit the amount failing which injunction will be deemed to be vacated. He mischievously filed another suit, in the Court of *Toba Tek Singh* and thrived on ad-interim order without deposit of balance consideration for more than three years fixed in the agreement. Learned Counsel placing reliance on case reported as *Hamood Mahmood v. Shabana Ishaq 2017 SCMR 2017*, wherein it was held 'on omission to seek permission to deposit balance sale consideration on the very first

date, makes the suit for specific performance liable to be dismissed. It was urged such legal position, was not considered by any of the three courts, rendering the impugned judgments bad in law. It was urged that when time for performance of respective obligation was made essence of contract, by freewill of the parties. Court cannot unilaterally rewrite the contract and, without justification extend time. Learned counsel argued that, the finding of the learned trial court, concurred by appeal and revision Court that the Respondent was always willing to perform the contract, is contrary to the fact and evidence on record. It was argued that Impugned judgment is based on gross misreading and non-reading of evidence. Learned Counsel took us through record to show that despite repeated indulgence by the learned trial Court, Appellate Court., Respondents failed to deposit the balance sale consideration, which is sufficient to show that he had no means nor ability to pay. He was, not ready and willing to fulfil his financial obligations as per agreement. The amount, in local currency, was deposited in court, after more than three years fixed in the agreement. Learned Counsel argued that the impugned judgment is based on assumptions and supposition beside being contrary to law, as laid down by superior Courts. In support of his contentions, he has relied upon *Malik Imam Baksh 2017 SCMR 516, Hamood Mehmood v. Mst. Shabana Ishaq 2017 SCMR 2022 and Kuwait National Real Estate Co (Pvt) Ltd v. Educational Excellence Ltd. 2020 SCMR 171.*

9. Malik Muhammad Qayum, learned senior ASC for the Respondent, supported the impugned judgements. He urged, Respondent offered the balance sale consideration to the appellant before the date fixed in the agreement. Such circumstances, according to him, reflects that the Respondent was ready and willing to perform the agreement. According to him, filing of the suit for specific performance, before the due date, is also manifestation of fact that the Respondent was always ready and willing to perform his part of the contract. When queried, why the Respondent did not deposit the amount, as directed by the learned trial Court *Pir Mahal*, in the first instance. He stated, since before the time fixed for the deposit, second suit was filed; in the court of *Civil Judge Toba Tek*

and the court did not called upon him to deposit the balance amount, Respondents cannot be held liable for the act of the Court. He contended that the on the directions of Appeal Court, the balance amount in foreign Currency could not be deposited, as the trial court had no foreign currency account and he was handicapped and circumstances beyond his control. The amount in local currency, after due permission form the court was deposited.

10. Arguments heard. Record perused.

11. In the instant case, the agreement to sell dated 26.3.2014, to ensure that both the parties perform their reciprocal promise and obligations by 15.04.2015.

12. Respondent/Plaintiff on 14.3.2015 filed a suit for specific performance, in the Civil Court, *Pir Mahal*. On the same date, injunctive order not to create third party interest; subject to deposit of balance consideration was passed. Twice time was enlarged and, the suit was adjourned to 11.4.2015. Instead of depositing amount, the Respondents on 1.4.2015 filed yet second suit in the Court of *Civil Judge Toba Tek Singh*, and enjoyed injunctive relief without any deposit of balance consideration and conveniently withdrew the earlier suit before the Civil Judge *Pir Mahal*, on 11.4.2015.

13. Second suit was contested on merits; the application under Order 39 Rule 1 & 2 CPC filed along with the suit was allowed without, any direction to deposit balance sale consideration vide order dated 02.11.17. On appeal, order of the trial court was modified to the extent that the remaining sale consideration of £ 200,000 was directed be deposited within a period of 120 days of vide Order dated 01.02.18. It is matter of record that the balance consideration in Pakistani currency in the sum of Rs. 3, 70, 00,000/-was deposited in the treasury of the trial court on 02.10.18 after more than three years from the date fixed in the agreement.

14. Suit proceeded on merits parties led their respective evidence. Plaintiff Muhammad Arif appeared as PW-1 in cross examination admitted that "*other than earnest money no amount was paid*". He

further admitted that "It is correct that learned Court directed to deposit the balance sale consideration, we did not deposit the amount in the earlier Suit"..... "I have not deposited balance sale consideration in any Court, nor have I issued any notice to Jamil to calling upon him to receive balance consideration and execute the sale deed"

15. Appellant/defendant, Muhammad Jamil appeared as DW-1 and deposed that "he returned from Scotland in February to complete the transaction, defendant expressed disability to pay the amount and later filed the suit." Learned trial Court on preponderance of evidence concluded vide judgment dated 07.02.19, that the Plaintiffs, are entitled to a decree of specific performance with respect of agreement to sell and to receive back the security amount deposited in Pakistani Rupee as per the Orders of the appellate court. Trial Court gave 30 days further time from the date of the judgment to deposit the amount of £ 200,000 in the Court. Appeal was dismissed on 27.11.2019 and so also Revision petition met the same fate through judgement dated 23.12.2019 impugned herein.

16. Specific Performance is a discretionary relief, and the Courts are not bound to grant such relief mechanically merely, because it is lawful to do so. The discretion to grant relief of specific performance or otherwise, by the Court is not something mechanical or arbitrary exercise of jurisdiction but, is structured on sound and reasonable judicial principles, amenable to judicial review and correction by the court of appeal<sup>1</sup>. Genesis of agreement to sell draws its lineage from the Contract Act 1872<sup>2</sup> and principles enumerated therein, have direct bearing on interpretation and deciphering the intent, purpose, manner and consequences flowing from agreement to sell. However, in contemporary jurisdiction in India, Specific Relief Act, 1963 has replaced archaic Specific Relief Act, 1877 thereby substantially and suitably amended to addresses many ground realities having direct bearing on specific performance

<sup>1</sup> Section 22 of the Specific Relief Act, 1877

<sup>2</sup> Section 3 of the Contract Act "Words defined in contract Act. And all words occurring in this Act, which are defined in the contract Act, 1872 shall be deemed to have the meaning respectively assigned to them by that Act".

of promise and obligations arising out of contracts. Attending to present case, the reciprocal obligations under the agreement are to be performed, in the manner and sequence it is provided for. Where the agreement does not expressly provided the manner such obligations are to be accomplished, than the respective obligations are to be performed in the manner and sequence, which the nature of transaction requires<sup>3</sup>. In case in hand as noted, the Respondent under the agreement, was required to make the balance payment on or before 15.4.2015, where upon the Appellant was correspondingly obligated to sign and execute the conveyance deed, and hand over the possession. Foremost requirement to seek specific performance, for a vendee is to demonstrate his *readiness and willingness* to perform the agreement<sup>4</sup>. The Promisor (vendor) need not perform his part of promise or obligation, unless the promisee (i.e vendee) "is ready and willing to perform his reciprocal promise." In cases arising out of agreement to sell, a vendee to demonstrate his *readiness and willingness* to perform his part of obligation, has to plead, that he had offered to pay, was and is always prepared to pay the consideration. In a recent case, cited as *Mst. Samina Riffat v Rohand Asghar and others*<sup>5</sup>, such aspect of the matter was considered, this court cited with approval case of *Abdul Hamid v. Abbas Bhai- Abdul Hussain*<sup>6</sup>. The court held<sup>7</sup> "*In the first place, willingness to perform one's contract in respect of purchase of property implies the capacity to pay the requisite sale consideration within the reasonable time. In the second place, even if he has the capacity to pay the sale consideration, the question still remains whether he has the intention to purchase the property. On consideration of all the facts, it appears that the appellant was not in a position to pay the balance sale consideration. At any rate, the appellant was not willing, even if he had the capacity to pay the money, to have the sale deed completed.*"

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<sup>3</sup> See Section 52 of the Contract Act 1872

<sup>4</sup> Section 51 of the Contract Act, 1872

<sup>5</sup> 2021 SCMR 7

<sup>6</sup> PLD 1959 (WP). Karachi 629

<sup>7</sup> Ibid at page 632

17. Agreement to sell, as noted above, is comprised of reciprocal promises and corresponding obligations to be performed in the manner provided for. A vendee cannot seek enforcement of reciprocal obligation on the part of vendor to execute sale deed, unless he demonstrate that he not only has the financial capacity but he was and is also always willing and ready to meet the same<sup>8</sup>. The Promisor/Appellant (Vendor) need not perform his part of promise or obligation to execute conveyance, unless the promisee/Respondents, (the vendee) *"is ready and willing to perform his reciprocal promise."* This Court in a recent case held it to be "*mandatory for such party that on first appearance before the court or on the date of institution of the suit, it shall apply to the Court for permission to deposit the balance amount. Any omission in such regard would entail the dismissal of the suit or decretal of the suit, if it was filed by the other side*"<sup>9</sup>.

18. In a case where a party seeking specific performance of agreement to sell moveable property ('Shares' in a corporate entity), it was held by this court that "*It is now well settled that a party seeking specific performance of an agreement to sell is essentially required to deposit the sale consideration amount in court. In fact, by making such deposit, the plaintiff demonstrates its capacity, readiness and willingness to perform its part of the contract, which is essential requirement to seek specific performance of a contract*"<sup>10</sup>. In a case from across boarder cited as *Pushparani S. Sundaram and Others v. Pauline Manomani James (deceased) and others*,<sup>11</sup> apex court interpreted 'readiness and willingness' from the conduct of the plaintiff and the totality of circumstances in that particular case. Court considered imperative that "*that mere plea is not sufficient, it has to be proved.*" (One may also gainfully see *Saradamani Kandappan and Ors. vs. S. Rajalakshmi and Ors.*,<sup>12</sup> C.S. Venkatesh

<sup>8</sup> Section 51 of the Contract Act 1877

<sup>9</sup> *Hamood Mahmood v. Shabana Ishaq* 2017 SCMR 2022 (@. 2023]

<sup>10</sup> *Kwait National Real Estate Co (Pvt) Ltd v. Educational Excellence Ltd.* 2020 SCMR 171

<sup>11</sup> (2002) 9 SCC 582

<sup>12</sup> (2011) 12 SCC 18 Paragraph 31.

*vs. A.S.C. Murthy D through Lrs.<sup>13</sup>* Consensus of judicial precedent that emerges is “*The amount which he has to pay the defendant must be of necessity to be proved to be available. Right from the date of the execution of the contract till the date of the decree, he must prove that he is ready and willing to perform his part of the contract. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready to perform his contract*”<sup>14</sup>

The apex court of India, while restoring the judgment of the learned trial court further held: -

*“Mere plea that he is ready to pay the consideration, without any material to substantiate this plea, cannot be accepted. It is not necessary for the plaintiff to produce ready money, but it is mandatory on his part to prove that he has the means to generate the consideration amount.”<sup>15</sup>*

19. In the light of above stated legal position, we have examined the case in hand. It is matter of record that the Respondent/Plaintiff filed a suit for specific performance, along application under Order 39 Rule 1 & 2 CPC with the Civil Court, Pir Mahal on 14.03.15, a month before the cutoff date fixed for specific performance of the agreement to sell. On the very first date of presentation of suit, learned trial Court, granted injunctive order, not to create third party interest, subject to deposit of balance consideration, it was further ordered that *on failure to deposit the amount the ad-interim order shall be deemed to be vacated*. On the adjourned date i.e 28.3.2015, on application, further time enlarged to 30.3.2015 with a caveat that *on failure to deposit the balance amount ad-interim order deemed vacated*, and the suit, adjourned to 11.4.2015.

20. It is matter of record that the respondent did not deposited the balance sale consideration by the date ordered by the court in the first mentioned suit. On 1.4.2015, the Respondent filed yet second suit in the Court of Civil Judge Toba Tek Singh To give

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<sup>13</sup> AIR 2020 SC 930 = 2020 (3) SCC 280

<sup>14</sup> Paragraph 15 *ibid*;

<sup>15</sup> Paragraph 20 *ibid*;

jurisdiction to such Court, added additional Director Land, Sub-Registrar, Toba Tek Singh and the Province of Punjab and by concealment of proceedings of earlier suit, managed to obtained ad interim orders, without offering and or seeking any permission to deposit the balance sale consideration. The Respondents very conveniently withdrew the earlier suit before the *Civil Judge, Pir Mahal*, on 11.4.2015 with the permission to file a new suit after removing some legal defects, the withdrawal of suit was allowed, subject to cost of Rs.1000/- There is nothing on record to show that cost was deposited.

21. The appellant contested the second suit, in written statement appellant denied having refused to receive the balance consideration. It was also, stated that taking advantage of ad interim orders in earlier suit, the Respondents have broken open the lock had forcibly occupied the upper floor of the suit property and an FIR was got registered. It is matter of record the newly added official respondents were struck out being neither necessary nor proper party. The suit was transferred for trial to *Civil Judge Pir Mahal*, which exposed the conduct of the Respondent that they had no justification to withdraw the suit from the court having territorial jurisdiction and refile the same in Court having no territorial jurisdiction.

22. Learned Civil Judge Pir Mahal, heard the application under Order 39 Rule 1 & 2 C.P.C, granted the same without, any direction to deposit balance sale consideration and at the same time framed issues vide Order dated 02.11.17. On appeal, learned *Additional District Judge, Pir Mahal*, modified the order passed by the trial court to the extent that the remaining sale consideration of £ 200,000 was directed be deposited within a period of 120 days of vide Order dated 01.02.18. Appeal court, further cautioned, "*That if the Plaintiff/present respondent would not deposit remaining consideration amount within prescribed period, application under Order XXXIX, Rule 1 & 2, CPC, will be deemed to be dismissed.*

23. Respondent's failure to deposit the balance amount as directed by the appeal court, prompted the Appellant to file an application for dismissal of the suit under Order 7 Rule 11 CPC. Learned Civil Judge Pir Mahal, in consideration of fact that National Bank do not maintain foreign Currency account, on 27.9.2018 granted 2 days' further time to deposit the balance amount, with caveat that "*failing to do so shall result in invoking the consequences as laid down in 2017 SCMR 2022 even without hearing arguments of parties*". Record show that the Revision Court granted further seven days' time to deposit the amount in Pakistani currency in the sum of Rs. 3, 70, 00,000/ within seven days, which was ultimately deposited in the treasury of the trial court on 02.10.18, after more than three years from the date so fixed in the sale agreement.

24. Thereafter suit proceeded on merits and parties led their respective evidence. Plaintiff Muhammad Arif appeared as PW-1 in cross examination admitted that "*other than earnest money no amount was paid*". He further admitted that "*It is correct that learned Court directed to deposit the balance sale consideration, we did not deposit the amount in the earlier Suit*"..... "*I have not deposited balance sale consideration in any Court, nor have I issued any notice to Jamil to calling upon him to receive balance consideration and execute the sale deed*"

25. It is not the case of the plaintiff nor, our attention was drawn towards any material or evidence on record to show, that the defendant impeded or prevented the vendee to perform his obligation or vendor refused to receive the balance payment, which could have caused to, withhold performance of obligation on his part<sup>16</sup>. Observation of the learned appellate court in para 5 of the judgment that since the Appellant/Defendants admittedly "*had not served any notice for depositing of remaining consideration amount*". It may be observed that there was no occasion for the defendant to, demand the balance amount when the date fixed for performance had not yet matured, secondly the plaintiff prematurely filed the suit a month before the date fixed for specific performance. Then too despite the

<sup>16</sup> See section 53 of the Contract Act, 1872

directions of the *Civil Judge Pir Mahal*, balance sale consideration was not deposited though time was extended. To circumvent the consequences for non-deposit, Respondents filed another suit in the court of *Civil Judge, Toba Tek Singh*, without any justification, as no legal defect, as claimed, in the earlier suit was pointed out, by the learned counsel for the respondents. Official respondents were merely added to give jurisdiction to the court of *Toba Tek Singh*, was just a sham justification, which was not approved. A suit for specific performance subject to pecuniary or other limitation prescribed by law, lies in a court within the local limits of whose jurisdiction the immoveable property is situated<sup>17</sup>. It is matter of record that the subsequent suit in the instant matter was transferred to *Civil Judge Pir Mahal*, having territorial jurisdiction, over the subject property.

26. Even if it is presumed, as noted that no notice was issued by the Vendor to demand balance consideration, to make time essence of the Contract. Very fact that agreement and so also section 53 of the Contract Act guards against such eventuality and provides for the penal consequence for preventing the vendee to perform the agreement in the manner provided for. Specific plea was raised in the written statement that for failure to make the payment of the balance sale consideration within the period stipulated in the agreement the agreement stood rescinded and earnest amount forfeited. Such plea in the written statement was sufficient notice to ring the bell of recession, to put the Plaintiff on guard to promptly offer to deposit the balance consideration in the court to show his bonafides, readiness and willingness to perform his part of the reciprocal obligation.

27. Examining the case in hand penal consequence for the breach of respective obligations, under the sale agreement was provided in following terms:

"فریق دوئم مومنہ 15-04-2015 تک جایداد منکورہ کا قبضہ، انتقال ارجمندی میں  
خود و جس کے نام کے فریق اول کو بقیہ زیریح مبلغ -/- 200000 بربادی پاؤ نہزادا  
کر کے کردار سکتا ہے فریق اول کو کوئی غدر اعراض نہ ہوگا اگر فریق اول تعابدہ یعنی سے

<sup>17</sup> See Section 16(d) C.P.C

اُخراج کرے گیا انتقال ارجمندی فریق دو مم کے حق میں نہ کروائے گا تو فریق اول فریق دو مم کو بیانہ ادا شدہ کا درگاہ دینے کا پابند ہو گا نیز فریق دو مم کو حق حاصل ہو گا کہ وہ ہر قسم کی تافونی کارروائی ادعویٰ وغیرہ کرنے کا بھی مجاز ہو گا۔ اگر فریق دو مم معاملہ پیچ سے اُخراج کرے تو اس کا بیانہ ضبط تصور ہو گا دونوں فریقین اور ان کے درثاء معاملہ کے پابند ہوں گے"

meaning thereby that 'in case of failure of the defendant/vendor to perform, plaintiff was entitled to seek refund double the amount of earnest money and to seek enforcement of judgment under law. It was similarly provided that in case plaintiff fail to abide by the terms of the agreement, earnest amount shall be deemed forfeited'.

28. Another fundamental principle, often misconstrued, is that time is not the essence of the contract in cases of specific performance, in respect of immoveable property. Generally, reliance is placed on Section 55 of the Contract Act<sup>18</sup>. The archaic rule that generally, time is not of essence in contracts involving sale/purchase of immoveable property<sup>19</sup>, could not be used as a ground to grant or otherwise specific performance, unless the circumstances that prove otherwise are highlighted and proved by the vendor and/or vendee as the case may be<sup>20</sup>.

29. This Court, in the case of Malik Bahadur Sher Khan v. Haji Shah Alam<sup>21</sup> has calibrated the rule in accordance with the intent and spirit of the provision<sup>22</sup> of Contract Act quoted above in following terms:

"The argument of the learned ASC for the respondent that the time was not of the essence of the agreement does not appear to be correct when we look at the words used in the agreement providing that the remaining part of the agreement would be performed within one and a half months. If for a while we do not consider the dates mentioned in the agreement

<sup>18</sup> "Effect of failure to perform at fixed time, in contract in which time is essential: 55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before a specified time, and fails to do any such thing, at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

<sup>19</sup> PLD 1962 SC 1. PLD 1973 SC 39. 2009 (5) SCC 182, Paragraph 27.

<sup>20</sup> 2010 SCMR 286, Paragraph 10. 2015 SCMR 21, Paragraph 3.

<sup>21</sup> 2017 SCMR 902. Paragraph 7.

<sup>22</sup> Section 55 of the Contract Act.

showing terminus a quo and terminus ad quern then time would not be of the essence in any contract. If the date stipulated in the agreement is not considered as a terminus ad quern, we are at a loss to understand what else could be considered as a terminus ad quern. Such interpretation of the agreement, quite obviously, would not only put the vendor in a disadvantage but also leave him at the mercy of the vendee who may or may not perform the remaining part of the agreement on one pretext or another. This state of things could be accepted in the sixties and seventies of the 20th Century when the prices of the land used to be static for decades and decades together. Perpetuation of such a state of things in this part of the 21st Century would rather be unfair, unjust and even inequitable when every passing day brings a decrease in the value of the rupee and a manifold increase in the prices of the land. We, thus, do not approve diluting the import of the words used in the agreement expressing terminus a quo and terminus ad quem and envisaging time as of the essence of the contract."

30. The question, time is essence of contract or otherwise, was also examined by this Court in the case of Muhammad Abdur Rehman Qureshi v. Sagheer Ahmad<sup>23</sup> and it was concluded that:

"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,

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<sup>23</sup> 2017 SCMR 1696. Paragraph 9.

*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."*

31. The Plaintiff No.1 not only conceded in evidence that consequence for not making payment in time would result in forfeiture of the earnest money. He declined the offer of the Defendant to purchase the property at the current value. In a recent case<sup>24</sup> this court approved the forfeiture (of the 3.5 %) earnest amount, where the bidder failed to make the balance payment within time. In the instant case earnest amount paid to the defendant represent merely 7.834% of total sale consideration. The defendant was unjustly entangled in litigation and dragged up to this court with two suits, several rounds of appeals and Revisions, injunctive order, repeated noncompliance of orders of the trial and appellate court to deposit the balance sale consideration, delay in deposit of the amount beyond three years as set out in the agreement, clog of injunctive order on the rights of the defendant to deal with his property are some of the consideration, on which court may approve forfeiture of the earnest money by the vendor. Recently in the case reported as *Mst. Samina Riffat and others v. Rohail Asghar and other*<sup>25</sup>, on facts and circumstances noted therein, approved forfeiture of 50% of the earnest money.

32. From the facts, circumstances and evidence available on record It has become discernable to this Court, that the Plaintiff has deliberately created a cobweb to entice the court into concluding that such an intention to pay balance sale consideration was present. However, the truth could not elude the eyes of this court as decrypted above. In instant case, as noted above, specific time was set for performance of the contract, with consequences for both the parties committing breach of the time line, made time essence of the contract. The Respondent was not able to convincingly demonstrate that the time was not the essence of the contract and or that the

<sup>24</sup> Space Telecommunication (Pvt) Ltd. v. Pakistan Telecommunication Authority 2019 SCMR 101

<sup>25</sup> 2021 SCMR 7

defendant was either willing to accept the performance beyond the time so fixed or that the circumstances were such that the defendant could be forced to accept the performance beyond the time<sup>26</sup>.

33. Under facts and circumstances of the case, we are of the considered view that the Courts below have neither appraised the evidence correctly nor, appreciated the law on the subject properly and arrived at the wrong conclusion by inferring an intention to pay on the part of plaintiff that was merely being paraded and not proven. In light of the aforementioned discussion, the petition is converted into appeal and allowed.

34. As far as question of refund of the earnest money is concerned, court may always allow the defendant/vendor to appropriate the same in terms of the forfeiture clause in the agreement and or as may be deemed appropriate, the court may deem just reasonable to compensate the plaintiff. However, by way of sheer indulgence, generosity and grace learned counsel for the defendant on instructions agreed to refund 50% of the earnest money received from the plaintiffs through cross cheque. Court appreciates such benevolent gesture on the part of the defendant in suit.

Sd/- J  
Sd/- J

ISLAMABAD  
10<sup>th</sup> September, 2020

"Approved for Reporting"

<sup>26</sup> See Section 38, 47, 51 to 55 of the Contract Act 1872