IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Umar Ata Bandial
Mr. Justice MazharAlam Khan Miankhel
Mr. Justice MunibAkhtar

Civil Appeal No.1355/2006 and Civil Appeal No.1495/2006
(On appeal from the judgment dated 1.8.2006 passed by the High Court of Sindh at Karachi in HCA No.91/2006 & HCA.No.108/2006).

1. Mrs. ZakiaHussain and another ..(In CA.1355/2006)
2. Mrs. ZakiaHussain ..(In CA.1495/2006)

...Appellants

VERSUS

1. Syed FarooqHussain ..(In CA.1355/2006)
2. Syed FarooqHussain ..(In CA.1495/2006)

...Respondent(s)

For the appellants: Malik MuhammadQayyum, Sr. ASC
(In both cases) alongwith Syed Akbar Hussain

For the respondent(s): Mr. ShahabSarki, ASC
(In both cases) alongwith Syed FarooqHussain

Date of hearing: 12.2.2020&13.2.2020

JUDGMENT

MazharAlam Khan Miankhel, J-.

A sale agreement dated 31.01.2001 regarding Apartment No.4, third floor, Kashmir Court, Plot No.162/F/3, P.E.C.H.S., Karachi (Suit Property) is the matter of concern

between the parties to the present *lis*, i.e. the appellants as vendor/Defendants (Appellants) and the Respondent being the vendee/Plaintiff (Respondent). As per allegations in the plaint, when the appellants failed to perform their part of contract, respondent filed a suit for declaration alongwithsix other prayers fully described in the plaint. The appellants by contesting the same filed their written statement. After a regular trial, learned trial Court (High Court of Sindh) granted a decree in favour of respondent vide its judgment and decree dated 13.3.2006 but only withregard to prayers A, B and C and the said judgment & decree was silent with regard to other prayers. Both the parties feeling themselves aggrieved of the same, filed their respective appeals *(HCA No. 91/2006 and HCA No.108/2006)*. After hearing the parties, the learned division Bench of the High Court allowed the appeal of respondent (H.C.A.108/2006) by defining the terms and conditions of the judgment & decree by way of a short order dated 18.05.2006 whereas the appeal of the present appellants, (HCA.91/2006) was dismissed by way of a common judgment and decree dated 01.08.2006.

2. The appellants still feeling aggrieved have questioned the above noted common judgment & decree dated 01.08.2006 through two separate appeals before this court.

3. These appeals are pending adjudication since 2006. Once on 13.10.2016, this Court during the course of hearing had

noted that the respondent, during the course of trial, had not appeared as his witness and his attorney, who was not fully conversant with the facts and circumstances of the case personally, had deposed in the Court which is nothingless than a hearsay and the attorney does not fall within the purview of Order III Rule 1 & 2 of Civil Procedure Code 1908 (CPC). Besides the above, the oral evidence in the case was not recorded by the court itself as provided in Order XVIIIof CPC rather the same was recorded through a local commissionwhich does not qualify the test of exceptions for the purposes of recording of evidence by the commission. To resolve the above questions of law, Syed Najmal-ul-Hassan Kazmi and Mr. Makhdoom Ali Khan learned Senior Advocates Supreme Court were appointed as *amicus curiae*.

4. Both the learned Senior Advocates Supreme Court submitted their valuable written submissions through C.M.As.No.9968 and 9969 of 2017 respectively. We must appreciate that these submissions are really very helpful and beneficial to decide the above issues.

5. We, before considering the merits of the case, would like to dilate upon the above said legal questions. To consider the said issues, we may observe that there is no hard and fast rule available in law to answer the above questions. Facts and circumstances of each case are the determiningfactors in considering such like questions.

6. There is no cavilto the proposition that a question of law can be raised at any stage of the case but again that has to be considered in the light of facts and circumstances of each case. It is for the court to decide whether such party can be allowed to raise such objection for the first time before this court or facts and circumstances of a case do not permit to allow a party to raise such question for the first time.

7. The courts of civil judicature for their procedure are regulated by the Code of Civil Procedure (Act V 1908) (Code) but at the same time it does not affect any special or local law or any special jurisdiction or power conferred or any special forum of procedure prescribed by any other law. It provides the general procedure for trial and proceedings of the civil cases besides the inherent jurisdiction of the civil courts. Appearance of parties during the trial/proceedings in person or through recognized agent/attorney is provided in Order III of the Code. So, appearance of attorney on behalf of a party is not alien to the civil judicature. An attorney is competent to act on behalf of the party in the light of specific authority given to him. The question beforeus requiring determination is whether a witness not fully conversant with the facts and circumstances of the case would be a competent witness within the meaning of Rule 1 & 2 of Order III CPC. The case law of the country so far developed regarding this question is based on the facts and circumstances

of each case. Initially, it is the party itself to depose about the first hand and direct evidence of material facts of the transaction or the dispute and its attorney having no such information cannot be termed as a competent witness within the meaning of Order III Rule 1 & 2 of CPC. Yes! The attorney can step-in as a witness if he possesses the first hand and direct information of the material facts of the case or the party had acted through the attorney from the very inception till the accrual of cause of action. Deposition of such an attorney under the law would be as good as that of the principal itself. Non-appearance of the party as a witness in such a situation would not be fatal. If facts and circumstances of the case reflect that a party intentionally did not appear before the court to depose in person just to avoid the test of cross examination or with an intention to suppress some material facts from the court, then it will be open for the court to presume adversely against said party as provided in Article 129 (g) of Qanun-e-Shahadat, Order 1984 (QSO, 1984).

8. Similarly while coming to the second question we may observe that recording of evidence is the job of the court. A witness while deposing before a court, his veracity, conduct and demeanor is adjudged by the court. A witness can be a party to the suit itself or attorney or witness of other facts and record. Rule 4 of Order XVIII (CPC) requires that evidence of a witness be recorded in open court. During such exercise court has to decide

about the admissibility of documents/evidence. Also the question of re-examination of a witness and allowing a party to cross-examine its own witness is also to be determined by the court but subject to the facts and circumstances of the case. Sometimes a woman as a witness is exempted from personal appearance as provided in Section 132 of CPC. A kind of sickness or infirmity of a witness may compel the court to issue commission for recording of evidence of such witness. Sometimes a witness is within the jurisdiction of the Court but cannot appear for any compelling reasons or a person outside the jurisdiction of the courtor is going to leave the jurisdiction or a person in the service of state can be examined through a commission. Even a commission can be issued to a court to record the evidence of a person residing within its jurisdiction. This entire procedure is provided in Section 75 to 78 read with Order XXVI of CPC.Even a local commission can be issued with consent of the parties. The provision of Rule 8 of the Order ibid would make it clear that an evidence taken under a commission cannot be read as evidence in the suit but with the consent of the party against whom the same is offered. It is for the court to satisfy itself regarding the conditions necessary for issuance of commission and on return of commission with deposition of witnesses,court can order it to be made part of the record of the suit. Even a High Court may issue a commission for recording of evidence of a witness under Rule 19 of Order ibid. So, in view of

the above discussion, we can say that it is the court seized of the matter to take a decision for issuance of commission by keeping in mind the facts and circumstances of the case.

9. After considering the above legal position, we would like to dilate upon the merits of the case by keeping in mind the above discussion on the questions of law.

10. The main stress of the learned counsel for the appellantsthrough his oral as well as written submissions remained the same as pointed out in question No.1 above. Besides this technical though legal argument, other submissions of the learned counsel for the appellants were that respondent did not make final payment of Rs.6,50,000/- inspite of reminders which as per sale agreement dated 31.01.2001 was to be paid on or before 31.07.2001 and thereby failed to perform his part of contract which prompted the appellants to cancel the sale agreement on 02.08.2001 as the date fixed for payment was the essence of contract. He further argued that appellants in order to perform their part of agreement were always ready to deliver the possession of the suit property “as is where is basis” but due to financial restraints respondent did not make the balance payment and failed to get possession of the suit property and prayed for dismissal of suit by accepting instant appeals.

11. As against that the learned counsel for the respondent submitted that the appellants had approved plan and

permission to raise construction of ground plus two floors and they had no such legal permission to raise construction of 3rd floor. The appellants by practicing fraud and concealment of this material fact, did not disclose the legal defect in their capacity to enter into an agreement for sale of an apartment on the third floor for which they had no valid and legal approval/sanction by the authority concerned. The cancellation of sale agreement unilaterally,he argued, is unlawful andhaveno adverse effect on his rights.He argued that the respondent was ready throughout to fulfill his part of agreement by making final payment but appellants were not in a position to deliver the possession of the apartment as the same was incomplete and not ready besides there was no legal approval/sanction for raising such construction. With these submissions the learned counsel for respondent supported the impugned judgment and decree and prayed for dismissal of both the appeals.

12. Learned counsel for the parties were heard and record of the case was perused. The perusal of the record would reveal that only non-payment of balance amount of Rs.6,50,000/- and the factum of legal and valid authority of appellants to enter into an agreement of sale in absence of approval/sanction from KBCA to raise construction of 3rd floor and the two law points discussed above would require consideration. Besides the above, we would also like to consider as to whether the facts and circumstances of

the case attract the commission of fraud, concealment of true facts and malice on the part of appellants. The execution of sale agreement dated 31.01.2001, payment of part of sale consideration amounting to Rs.1.5 million and the outstanding amount of sale consideration i.e. Rs.6,50.000/- on or before 31.07.2001 never remained disputed between the parties. Besides the above admissions, it has also been established on the record that initially the appellants, had lawful approval of Karachi Building Control Authority (KBCA) to raise construction of ground plus two floors and they had no such approval for raising construction of 3rd floor. Though their case in this regard, as per record and even admissions made by the appellants, remained pending since 1995 with KBCA and they also filed two civil suitsbefore the High court and then before the lower court but both the suits were dismissed. Again an established fact is that the appellants got lawful approval of occupying of entire building including 3rd floor on 25.02.2003 by the KBCA much after the filing of instant suit on 10.10.2001.

13. We, in the circumstance, first would like to discuss the effect of two legal questions mentioned above. The legal position in general of the issues has already been discussed above. Mainstress of arguments of the learned counsel for the appellants was also with regard to first question. No doubt, respondent, being a vendee to the sale agreement in question,

did not appear as his witness to depose about the material facts but when we go through the record of the case, it appears that this never remained a question of defence of the appellants throughout the trial and even during the course of hearing of their appeal by the High Court. They even did not bother to raise a specific ground in this regard.No doubt certain questions regarding some facts were put to attorney and he was not aware of the same. But in our view all the material facts requiring determination are either admitted or to be considered in accordance with law by the court. So, unawareness of the attorney regarding some immaterial facts would not make any dent muchless serious and material in the case of respondent.Since respondent, as an admitted fact, was abroad for his job, had appointed an attorney to pursue his case and his mere presence alongwith the original record on the day statement of attorney was recorded would again not be fatal to the merits of the case**.** Points in issue and disputed facts requiring consideration by the court are well before the court. Appointment of attorney in any special circumstance is within the sphere of law. That special circumstance of respondents living abroad is also not a disputed fact. His statement in the circumstances cannot be held to be against the provisions of Rule 1 & 2 of Order III (CPC). A look at the entire statement of GhulamHyderAbbasi, the attorney, would alsomake it clear that the same is a good

piece of evidence and he was fully aware of the material facts of the case.

14. Learned counsel for the appellants has relied upon the case law which in the circumstances cannot be made applicable to the facts and circumstance of the present case Dilshad Begum v. NisarAkhtar (2012 SCMR 1106) and Abdul Qayyum v. Muhammad Sadiq (2007 SCMR 957). Both the above noted cases were given under pre-emption laws and a question of performance of *talabs* by the agent was involved and there was no reason available on the record as to why the principal did not appear before the court to establish the factum of *talab*but in the case in hand reasons of absence of respondent were admitted as discussed above and there was not a single material fact which required its establishment by the plaintiffhimself. Again case of Abdullah Khan v. Nisar Muhammad Khan (PLD 1959 (W.P.) Peshawar 81) would also not be applicable. We fully agree with the finding that party knowing the facts should appear to face the test of cross-examination and this is the settled law. But here in this case reasons for appointment of attorney were not denied. Yes! on the day of recording of evidence his attorney had called him from abroad to bring the original record which he did. So, we in the circumstances, hold that non-appearance of respondent as his witness will have no adverse effect on his case.

As far as 2nd question is concerned, issuance of commission for recording of evidence is also within the jurisdiction of court and domain of law. The conditions and situations for issuance of commission have been discussed above. Record of the case reveals that the commission for recording of evidence was issued with consent ofboth the parties vide order dated 22.4.2002. Since trial of civil cases is conducted by the High Court and it is the general practice of the High Courtof Sindh that because of rush of work commissions are normally issued with the consent of the parties. If any party has got any objection regarding issuance of commission then, as per practice of the court, that objection is noted and properly considered by the court. We can lay hands on some of the cases wherein similar conditions have been dealt with.KhawajaFeroz v. Muhammad Dawood) (PLD 2008 Karachi 239), Badar Rahim v. HammadAsifDosslani(2009 CLC 459), IqbalM. Hamza v. Gillette Pakistan Ltd (2011 YLR 277), Hafeez Begum v. Zainab Muhammad Ali(2014 MLD 1000).Even Islamabad High Court in a case reported as BBC Pakistan (Pvt) Ltd v. MasudAlam(2018 YLR 363)adopted the same view**.** Besides the above, we may refer to a new provision of Rule 1A of Order X CPC where-under court

can adopt any lawful procedure, not inconsistent with the provisions of CPC, including issuance of commission with the consent of parties amongst others. The same is reproduced for ready reference:-

"ORDER X

EXAMINATION OF PARTIES BY THE COURT

1. ***Ascertainment whether allegations in pleadings are admitted or denied.____***

.....

[1A.The Court may adopt any lawful procedure not inconsistent with the provisions of this Code to:-

(i) Conduct preliminary proceedings and issue orders for expediting processing of the case;

(ii) Issue, with the consent of the parties, commission to examine witnesses, admit documents and take other steps for purposes of trial;

(iii) Adopt, with the consent of the parties, any alternative method of the dispute resolution including mediation, conciliation or any such other means.].

However, provincial assembly of Sindh introduced certain amendments to the Code of Civil Procedure Act (Act V of 1908) vide its Sindh Act IV of 2019 dated 25.02.2019 whereby Order X Rule 1A was substituted through Section 5 of the Act ibid which reads as under:-

> *"1A.- The Court may adopt any lawful procedure not inconsistent with the provisions of this Code and adopt any method of Alternative Dispute Resolution (hereinafter referred to as "ADR") under Section 89A of this Code".*

15. This court in the case Muhammad Sharif v. NabiBakhsh (2012 SCMR 900) has also appreciated this rule. While coming backto the facts of the case, we see that even no one raised any objection in this regard. During recording of evidence not a single objection of law was raised before the commission which could have hampered the proceedings before the commission. So, we without any hesitation can hold that there was no illegality in issuance of commission who only recorded the version of the parties and accepted the documents in evidence. The veracity of the evidence and authenticity and admissibility of documents was considered by the court itself which makes it lawful. Besides, no objection was raised by any of the parties during hearing either before the trial court or before the High Court in appeal. So, this does not lie in their mouth to raise such objection before this Court for the first time.

16. As far as next argument of the learned counsel for the appellants regarding non fulfillment of part of contract by the respondent by failing to make final payment on due date is concerned, that,in the peculiar circumstances of the case in hand, appears to be absurd and illogical. There is no denial of the fact that the date on which final payment was to be made i.e.

31.7.2001 the apartment in question was incomplete. The appellants being fully aware of its non-completion and having full knowledge of lack of approval/sanction of construction of third floor (where the suit property is situated) by KBCA, the concerned authority, unilaterally cancelled the sale agreement dated 31.01.2001 through a notice dated 02.08.2001 (sent through fax). The only reason for cancellation of sale agreement was non-payment of the balance amount of Rs.6,50,000/- by invoking and taking advantage of Clause 6 of the sale agreement but on the same side they just ignoredother Clauses of the sale agreement which speak of delivery of vacant and peaceful possession of the premises after informing vendee in writing and execution and registration of sale/sub-lease deed. There is nothing in black and white from the side of appellants asking the respondent to take possession. The agreement is silent regarding a specification of date and time of delivery of vacant possession and also the date of execution and registration of sale/sub-lease deed and it only mentions the date of final payment agreed between the parties. It is worth to mention that the sale price of the suit property included water, electricity and gas charges. The unilateral act of cancellation of sale agreement by the appellants was based on their misconception and mistaken belief of a term used in the sale agreement, “as is where is basis”. During the trial of the case appellants tried to develop a case that the respondent had agreed to accept delivery of possession of

incomplete apartment as he was short of finances and for that matter this clause was added in the agreement. Had this been the situation, it must have been written in the agreement in clear and unambiguous words. The respondent while observing the same incomplete condition of the apartment, finally served the appellants with a notice dated 7.9.2001 that he is ready to make payment subject to delivery of possession of apartment, complete in all respects and execution/registration of sale/sub-lease deed. On their failure to comply with their part of agreement, respondent filed instant suit wherein he also questioned the cancellation of sale agreement besides other reliefs and expressed his willingness to make payment subject to delivery of possession of the apartment and execution of sale deed. Record of the case would further reflect that the appellants don't have any defence much less plausible except non-payment of balance amount by the respondent within the due date and reiterated the stance of delivery of possession of the apartment on "*as is where is basis*". This defence on the very face of it appears to be baseless and unjustifiable. Unless specifically agreed upon between the parties due to some compelling reasons, a person of sound mind can in no way on the basis of the sub clauseaccept an incomplete structure without utilities, although same are undertaken in the agreement. In the given circumstances, we cannot agree with stance of the appellants regarding the date fixed for performance of contract to be a date essence of contract.

Mere mention of date in an agreement per se cannot be considered to be a date essence of contact. It is a settled principle of law that facts and circumstance of each and every case would be determinative factor to hold as to whether time is essence of contract or not. We in the given circumstances cannot agree with appellants. Here in this case conduct of the appellants is the most important factor to determine the fate of the case. It is an admitted fact on the record that the appellants initially had approval/permission from KBCA to raise construction of ground plus two floors which as per record was completed somewhere in 1995. Thereafter appellants started efforts to get permission to raise construction of 3rd floor. Again an admitted fact that prior to said approval/permission they had started construction of 3rd floor. They in this regard even filed a civil suit against KBCA in High Court and thereafter in the lower courts but both were dismissed. The respondent, in thecircumstances, having no other option, filed instant suit wherein he, after issuance of his legal notice dated 07.09.2001, once again expressed his willingness to pay/deposit the balance amount and asked for delivery of possession incomplete form alongwith execution of sale/sub-lease deed. It is worth to mention here that the suit apartment is still in that incomplete condition and the respondent on the directions of the court had deposited the balance amount in the court in 2006 which is still lying there.

17. It is time and again held by this court that specific performance of a contract is essentially an equitable and discretionary relief and the court seized of the matter is in a better position to decide and resolve not simply according to the spirit of the law but also in accordance with the principles of substantial justice by keeping in mind peculiar facts and circumstance of each case. It cannot be claimed as a matter of right. The discretion to be exercised by the court requires that it should not be arbitrary but should be sound and reasonable guided by judicial principles and capable of correction by a court of appeal. Such an exercise of grant or refusal of relief would depend on the facts and circumstances of each case and also the conduct of the parties. This is the mandate of Section 22 of The Specific Relief Act, 1877. The same is reproduced for ready reference:-

> "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."

18. The perusal of the above quoted provision of law clearly speaks the mandate of law. Learned counsel for the appellants placed reliance on the cases of Gulshan Hamid v. Abdul Rehman (2010 SCRM 334), Muhammad Ibqal v.

MehboobAlam (2015 SCMR 21), Muhammad AbdurRehmanQureshi v. Sagheer Ahmad (2017 SCMR 1696). A perusal of these judgments would reveal that the same cannot be made applicable to the peculiar facts and circumstances of the case in hand. Similarly the case ofArshadHussain v. ZenatunNisa (2017 SCMR 608) is also not applicable being altogether a case of different facts and law.

19. A look at the entire record of the case would make it abundantly clear that here in this case the vendee/respondent was cheated and defrauded by concealing the factum of non-approval/sanction from KBCA for illegal construction of 3rd floor where the suit apartment is situated. Though the appellants have tried to make out a case that the said non-approval/sanction from KBCA was brought into the knowledge/notice of the respondent and thereafter the respondent entered into an agreement of sale. This stance of the appellants does not get support from record of the case. Even the sale agreement is silent in this regard. Respondent might have seen, as alleged, the construction being carried out on 3rd floor but that does not mean that he had knowledge of the above deficiency. Even at the time of sale agreement, both the suits of appellants against KBCA for seeking approval were dismissed. This was a fact so important that this should have been brought into the notice of respondent in clear and unequivocal terms. Because grey

structure was there but permission/sanction of the concerned authority was not there. So, in such a risky state of affairs, knowledge and notice of respondent in something black and white was must. Thereafter it would have been his open choice to go for agreement to sell or not. At least there should have been a clause in the sale agreement that sale deed or possession would be delivered after getting proper approval of the entire 3rd floor or anything like that. But there is nothing of the sort. To the good luck of the respondent that the said approval of 3rd floor by the KBCA was accorded on 25.02.2003, much after the institution of present suit otherwise his already deposited amount of Rs.1.5 million would have been at risk. Had the appellants have *bona fide* intention, aftergetting approval, they could have asked the respondent that remaining work of the apartment would be completed by them and by the time he should make payment of balance amount but they continued with the contest and have dragged him for almost two decades when Rs.1.5 million were already paid in 2001 and remaining balance Rs.6,50,000/- was deposited on the orders of the court in the year 2006. The respondent in his plaint has asked for damages and costs of suit etc but the record would reveal that there was no such evidence brought by the respondent. In such like situations actual loss and damages cannot be calculated rather principle of rule of thumb is applied. We think this aspect should have been considered by the High Court (in trial and then in appeal).We, in

the circumstances,would not like to grant such relief to respondent at this stage but would dismiss both the appeals with costs of Rs.3,00,000/- (three lac) for false and vexatious defense and wasting the time of courts. This amount of costs be recovered/paid to the respondent from the balance amount of Rs.6,50,000/-lying with the court and the remaining i.e. Rs.3,50,000/- can be withdrawn by the appellants.

Judge

Judge

Judge

Announced at Islamabad on _____

Judge

“APPROVED FOR REPORTING”

‘Sarfraz/’-