SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE SHAHID WAHEED

Civil Appeal No.431 of 2021

(On appeal against the judgment dated 10.03.2021 passed by the Islamabad High Court, Islamabad in R.F.A.No.163 of 2018)

Liaquat Ali Khan ... Appellant

VERSUS

Muhammad Akram & another ... Respondent(s)

For the Appellant	:	Mr. Zulfiqar Ali Abbasi, ASC Syed Rifaqat Hussain Shah, AOR
For Respondent No.1	:	Mr. Tariq Mehmood, Sr.ASC
For Respondent No.2	:	Mrs. Bushra Qamar, ASC Mr. Tariq Aziz, AOR
Date of Hearing	:	19.01.2023

JUDGMENT

Shahid Waheed, J. We are in complete agreement with the reasoning and conclusion of the High Court, and as such, a brief statement of the short point that arises for decision and of the grounds for dismissing this appeal is all that is needed here.

2. This appeal is by the plaintiff and it is prayed to restore the decree dated 2nd of July, 2018 of the original Court by setting aside the decree dated 10th of March, 2021 passed by the High Court. So the short question before us is which of these two decrees is correct. Here are some relevant but brief facts to answer this question. The plaintiff's claim is based on two agreements. Both these agreements are related

to defendant No.1's property i.e. House No.192, Street No.7, Rawal Town, Islamabad. The first agreement (Ex.P.1) is dated 10th of February, 2016 while the second agreement (Ex.P.2) is dated 11th of March, 2016. There is no dispute between the parties to the execution of the agreements and the terms contained therein. It was agreed between the parties that defendant No.1 would sell his house to the plaintiff for Rs.10,000,000/-. Of this amount, Rs.500,000/- was paid as advance and the remaining amount was agreed to be paid in two installments. The first installment of Rs.4,500,000/- was to be paid by 10th of March, 2016 and the second installment of Rs.5,000,000/- was to be paid by 10th of June, 2016. The first installment was paid as promised, but the second installment was not paid on time, leading to a dispute between the parties. The plaintiff then instituted a suit and requested the Court to issue an order, for specific performance of both agreements, to defendant No.1 and grant him possession of the house.

3. Given the above-mentioned facts, to succeed in his suit for specific performance, the plaintiff had to prove: (a) that defendant No.1 committed breach of the agreements; and (b) that he was always ready and willing to perform his part of the obligations in terms of the agreements.

4. In paragraph 6 of his plaint, the plaintiff has clearly written that he was and is ready to abide by the terms of the agreements provided that defendant No.1 fulfills all the relevant requirements of the Capital Development Authority (CDA)/defendant No.2 for transfer of the house. This alludes that the plaintiff did not pay the second installment because defendant No.1 did not fulfill the requirements of the CDA for transfer of the house before the stipulated time. The same was also stated by the plaintiff before the trial Court as PW.1. He stated in his statement that he had been contacting defendant No.1 for payment of second installment amount of Rs.5,000,000/- but he kept delaying and he neither obtained the NOC from the CDA nor

got a date from the CDA for the transfer of the house. He further stated that he had also issued a legal notice (Mark-C) to defendant No.1 on 14th of June, 2016 stating the above facts and asking him to obtain NOC from the CDA and within ten days hand over the possession to him otherwise legal action will be initiated.

5. On the other hand, defendant No.1 maintains that on 19th of April, 2016 he had obtained a No-Demand Certificate (Ex.D.1) regarding property tax, water and allied charges and was ready to transfer the house as per the terms of the agreements, but the plaintiff did not pay the amount of second installment and, due to which he informed the plaintiff by a legal notice dated 18th of June, 2016 (Mark D-A) that he had cancelled the agreements and forfeited the advance. Defendant No.1 appeared before the Court as DW.1 and reiterating the above-mentioned stance stated in his cross-examination that he had also applied for getting NOC in the CDA office and to establish this fact produced receipt (Ex.D.2). Defendant No.1 further stated in his cross-examination that he did not receive any notice from the plaintiff. Here it is important to clarify that defendant No.1's notice (Mark D-A) was received by the plaintiff's witness Muhammad Ajaib Abbasi (PW.3) and he has also admitted this fact in his cross-examination.

6. Taking stock of the oral and documentary evidence brought on record, the trial Court concluded that obtaining the NOC/NDC was an essential condition for transfer of the house and since the defendant No.1 failed to obtain the same, the plaintiff could not be held to have breached the agreements. Based on this conclusion, the trial Court decreed the suit as prayed for, and directed defendant No.1 to transfer the house to the plaintiff.

7. On first appeal, the High Court re-examined the evidence in exercise of powers under Section 96 CPC and found that the plaintiff had not adduced anything in his evidence to show that on the due date, he had the required

funds to pay the amount of the second installment. The High Court thus took the view that the plaintiff was not ready to perform his part of the agreement, however, keeping in view the principle of equity and taking a cue from the case of Muhammad Abdur Rehman Qureshi v. Sagheer Ahmad (2017 SCMR 1696) it was held that the suit of the plaintiff ought not to have been decreed, and thus, subject to return of Rs.5,000,000/- by defendant No.1 to the plaintiff, the decree of the trial Court was set aside and the suit brought by the plaintiff was dismissed.

8. Now comes the stage of stating the grounds which led us to affirm the findings of the High Court on which it based its decree. We deem it appropriate to drap our justifications in relative brevity. Firstly, the reason which prevailed with the trial Court in decreeing the suit was that defendant No.1 had not obtained a No Demand Certificate from the CDA, which was held to be a condition for transfer of the house, was not valid, because, there is no clause in the agreements (Ex.P.1 & Ex.P.2) which obliges defendant No.1 to obtain such a certificate before the transfer. Regardless to this position, the evidence available on record shows that defendant No.1 had on 12th of April, 2016 obtained a No Demand Certificate (Ex.D-1) from the Directorate of Revenue, CDA, regarding property tax, water and allied charges. Defendant No.1 also produced the receipt dated 19th of April, 2016 for payment of property tax (Ex.D 1/1) and a copy of letter dated 19th of April, 2016 (Ex.D.2) from the Directorate of One Window Operation of the CDA regarding request for issuance NOC. Secondly, the plaintiff's claim that he had issued a legal notice to defendant No.1 on 14th of June, 2016 asking him to obtain an NOC from the CDA and transfer the house to him, appears to be an abortive attempt to cover up his default because he had not produced any postal receipt showing its dispatch, which was essential particularly when defendant No.1 had denied receiving of such notice in his written statement. Thirdly, to prove readiness and willingness to perform an obligation to

pay the second installment of Rs.5,000,000/- in terms of agreements (Ex.P.1 & Ex.P.2), the plaintiff was under burden to adduce evidence to show availability of funds to make such payment in time, or if he did not have sufficient funds to meet his obligation, he had to prove how the funds would be available to him. No such evidence was brought on record by the plaintiff. Therefore, even assuming that defendant No.1 had committed breach, since the plaintiff had failed to prove that he was always ready and willing to perform the essential terms of the agreements which were required to be performed by him, there was a bar to specific performance in his favour. And lastly, 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, 1877 expressly stipulates so. In the present case all equities are squarely in favour of defendant No.1.

9. So viewed, we do not find any flaw in the judgment rendered by the High Court and thus hold that decree issued by it is valid. This appeal must be dismissed and we do so.

Sd/-
Judge

I regret my inability to agree. I allow the appeal for reasons to be recorded.

Sd/-
Judge

Sd/-
Judge

Announced in open Court on 07.07.2023 at Islamabad.

Sd/-
Judge

ORDER OF THE COURT

By a majority of two to one (Munib Akhtar, J dissenting), this appeal is dismissed.

Sd/-
Judge
Sd/-
Judge
Sd/-
Judge

"Approved for reporting".

Munib Akhtar, J.: I have had the privilege of reading in draft the judgment delivered by my learned colleague Shahid Waheed, J., with whom my learned colleague Ijaz ul Ahsan, J. agrees. With regret, I find myself unable to come to the conclusion as has found favor with the majority. While my learned colleagues have dismissed the appeal, I would have allowed the same and upheld the judgment of the learned trial Court, decreeing the suit that had been filed by the appellant (the buyer). The following are, briefly stated, my reasons for coming to this conclusion.

2. The relevant facts have been set out in detail in the impugned judgment of the learned High Court as also in the majority judgment and therefore need not to be rehearsed here. The learned High Court has principally given two reasons for allowing the appeal that had been filed by the contesting respondent (the defendant in the suit). With respect, I am not persuaded that in respect of either of those grounds the learned High Court had dealt correctly with the case as a matter of law.

3. It has been held by the learned High Court that time was of the essence of the contract between the parties. I am unable to agree. It is well settled that in respect of the sale of immovable property time is not of the essence of contract unless the parties so provide, either expressly or by necessary implication. Time can be made of the essence after the contract is made. None of these situations apply in the facts and circumstances of the present case. The learned High Court has relied upon the penal consequence provided for in the agreement for non-payment of the sale consideration to conclude that time was of the essence. However, such clauses are unexceptionable and are routinely to be found in contracts for the sale of immovable property. To conclude from such a clause that time was of the essence by express intent is, with respect, a mistaken view of the law. Having considered the record as a whole I do not find anything therein that would indicate that time was of the essence of the contract or was so declared subsequent thereto and that therefore the non-tendering of the balance sale consideration was fatal for the success of the appellant's suit.

4. The other ground that found favor with the learned High Court, was that the appellant did not have the necessary funds to make payment of the balance sale consideration at the stipulated time. In other words, the appellant was not at all material times ready, willing and able to fulfill his part of the bargain. The requirement that the plaintiff (whether vendor or vendee) be ready, willing and able to fulfill his part of the bargain is a rule that has to be understood and applied in context. In my view this equitable rule cannot be so applied as to make the time essence of the contract, which would inevitably be the result if the rule were to be applied literally and strictly in the manner as held by the learned High Court. In other words, these two rules which, to a certain extent, can be regarded as making competing claims on the outcome of the case have to be applied on an overall consideration of the facts and circumstances of the case in a manner that does equity between the parties. My assessment of the record is that there were defaults and delays on both sides and those on the part of the defendant (the present respondent) could not be regarded as inconsequential or trivial. Therefore, to insist on applying the rule of being ready, able and willing on the plaintiff without looking to the conduct and position of the defendant would be one-sided and unilateral, and hence inequitable.

5. It is to be noted that by the time the suit came to be filed one-half of the sale consideration had already been paid by the appellant. The appellant sought interim injunctive relief which was granted by the Court subject to the deposit of the balance amount by the next date of hearing which was admittedly done. Thus, the whole of the sale consideration was either with the defendant or within the power of the Court. Furthermore, the suit was filed promptly and not towards the tail end of the period of limitation. In my view, these facts are enough to establish, on an equitable basis, that the appellant fulfilled the requirement of being ready, able and willing to abide by his part of the bargain. Even if the record establishes (as to which, with respect, I have my doubts) that on the specific date for payment of balance sale consideration as set out in the contract the appellant did not show that he had the necessary funds available, that finding would have to be balanced against the delay and default on the part of the respondent. Accordingly, viewing the entire case holistically I am of the view that the appellant ought not to have been non-suited

on the basis that he did not show that he had the balance funds on hand on the date as written in the contract. In any case to conclude otherwise would be to, in effect, make time the essence of the bargain which, as already noted, was not the case at hand. In this context, I am, with respect, unable to agree with the manner in which the learned High Court, in para-21 of the impugned judgment, has dismissed the explanation put forward by the appellant as to why a pay order for the balance amount was not prepared by the stipulated date.

6. For the foregoing reasons in my respectful view the appeal ought to have been allowed.

Sd/-
Munib Akhtar, J.
20/7/2023