

98/24

SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Mr. Justice Munib Akhtar, ACJ
Mr. Justice Shahid Waheed
Mr. Justice Irfan Saadat Khan

C.P.L.A.812-K/2022 AND CMA NO.572-K/2022

- AD
AFR.
1. CPLA No.812-K2022 Zeeshan Pervez (Late)
(Against the order dated through his Legal heirs v.
24.05.2022 passed High Muhammad Nasir
Court of Sindh, Karachi in
HCA No.1942020)
 2. CMA No.572-K/2022 Zeeshan Pervez (Late)
(Stay application) through his Legal heirs v.
Muhammad Nasir

For the Petitioner(s) : Mr. Abdul Qadir Khan, ASC/AOR
(via video call from Karachi)

For the Respondent(s) : Mr. Muhammad Wawda, ASC

Date of Hearing : 21.05.2024

JUDGMENT

Shahid Waheed, J: This petition seeks leave to appeal against the decree issued under the judgment dated 24th of May, 2022 from a Division Bench of the High Court of Sindh at Karachi. This judgment upholds a consolidated judgment dated 31st of August, 2020 and a decree dated 15th of September, 2020 rendered by a Single Bench of said High Court.

2. To better understand the matter, we will refer to the parties involved in the petition as the “vendor” and the “vendee.” This terminology will help clarify the intricate circumstances and complexities we are evaluating, allowing for a more nuanced comprehension of the issues under review.

3. This petition is by the vendor, who contends that the vendee had not fulfilled his contractual obligations, justifying the contract’s rescinding and arguing against its specific performance.

4. This case emerges from two distinct suits: one seeking the annulment of the contract and the other pursuing the specific performance of the said contract. The foundation of these legal actions is a contract dated 26th of March, 2013 (Exh.5/57), wherein the vendor committed to sell his property, identified as No.72/III, located at 16th Lane, Phase VII, Pakistan Defence Officers Housing Authority, Karachi, to the vendee for the total consideration of Rs.25,850,000/-. An advance part payment of Rs.2,585,000/- had been made, with the remainder of the purchase price to be settled in two separate installments. As of this point, the facts presented are admitted by both parties, and there exists a clear consensus with no contention or disagreement between them.

5. The core of the disagreement revolves around the payment of the remainder of the purchase price. To fully comprehend the intricacies of this issue, it is imperative to scrutinize the payment schedule, the consequences of any deviations from the agreed-upon timeline, and the respective obligations that must be fulfilled by each party to finalize the sale. Thus, a thorough examination of the complete text of the contract (Exh.5/57) is essential, and we will provide the contract in its entirety for clarity and context.

"THIS AGREEMENT TO SELL is made at Karachi, this 26 day of March, 2013.

BETWEEN

MR. ZEESHAN PARVEZ S/O MR. PARVEZ MAZHAR, Muslim, adult holding CNIC No.42301-0582900-3, Resident of 72/III, 16th Lane, Kh-e-Badar, Phase-VII, DHA, Karachi, hereinafter referred to as the "VENDOR" (which expression shall wherever the context so permits mean and include his heirs, executors, successors, attorney, administrators and assigns) of the ONE PART.

AND

MR. MUHAMMAD NASIR S/O MUHAMMAD YAMIN, Muslim, adult, holding CNIC No.42101-7213494-3, Resident of House

No.A-90, Block-A, North Nazimabad, Karachi, hereinafter referred to as the "vendee" (which term shall mean and include his executors, administrators, legal representatives and/or assigns) of the OTHER PART.

WHEREAS the Vendor above named at the time of these presents seized, possessed of and well and sufficiently entitled to all that PLOT OF LAND BEARING NO.72/III, MEASURING 550 SQUARE YARDS OR THEREABOUT, 16TH LANE, PHASE-VII, TOGETHER WITH GROUND PLUS ONE STORIED BUNGALOW THEREON, SITUATED AT PAKISTAN DEFENCE OFFICERS HOUSING AUTHORITY, KARACHI, hereinafter referred to as the "SAID PROPERTY"

AND WHEREAS the Vendor has agreed to sell and the Vendee has agreed to purchase the said property for a lump sum price of Rs.2,58,50,000/- (Rupees Two Crore Fifty-Eight Lac Fifty Thousand only) free from all claims, objection, litigation, liens, bills, suits, disputes charges, fees, encumbrances of whatsoever.

NOW THEREFORE THIS AGREEMENT WITNESSETH AS UNDER: -

1. That the Vendor has received from the Vendee a sum of Rs.2,00,000/- (Rupees Two Lac only) through Cheque No.0041740420 dated 22.03.2013 drawn on Faysal Bank Ltd., Karachi, and now on signing of this Agreement a further sum of Rs.23,85,000/- (Rupees Twenty-Three Lac Eighty-Five Thousand only) THROUGH No.01700373 Rs.1900,000/-FBL HO 0041740422 Rs.485,000/- FBL HO both the sums totaling to Rs.25,85,000/- (Rupees Twenty Five Lac Eighty Thousand only) being the advance part-payment towards sale consideration of the said property, receipt of which the Vendor doth hereby fully admit and acknowledge separately.
2. That a further sum of Rs.34,15,000/- (Rupees Thirty Four Lac Fifty Thousand only) shall be paid by the Vendee to the Vendor on or before March 20, 2013 and balance payment of Rs.1,98,50,000/- (Rupees One Crore Ninety Eight Lac Fifty Thousand only) shall be paid by the Vendee to the Vendor at the time of handing over the vacant and peaceful physical possession of the said property and completion of sale formalities including registration of Sale Deed/General Power of Attorney in favour of the Vendee or his nominee(s) on or before 15/08/2013.
3. That if the Vendee fails to make the balance payment within stipulated period in such case the Vendor shall be entitled to FORFEIT the amount of advance part-payment and similarly if the Vendor fails to complete the sale formalities or refuses to transfer the said property in favour of the Vendee or his nominee within the stipulated period in such case the Vendor shall be liable to refund the DOUBLE of advance part payment.
4. That after the payment of Rs.34,15,000/- the Vendor shall be responsible to full pay off the debt/loan against the said property and obtain the Clearance Certificate/NOC from the Bank concerned.

5. That the Vendor shall be liable to pay all dues, debts, claims, litigations, loan, mortgage, taxes, electricity bills, gas bills, water & conservancy tax, property tax, refurbishment charges, against the said property upto the date of handing over the said property to the Vendee and from the date thereof the same shall be borne by the Vendee. The Vendor shall also be responsible to get the Mutation in his name prior to the date of final payment from CBC, MEO & DHA.
6. That the Vendor covenants with the Vendee that the said property is his separate, exclusive, individual and absolute property & that he has legal rights, full power and lawful authority to transfer/sell the same to the Vendee.
7. That the Vendor hereby confirms that he has not entered into any agreement or negotiation with any other person(s) regarding sale of above said property.
8. That the Vendee shall have the right to get the said property transferred in his own name(s) or in the name of his nominee(s) and the Vendor hereby agrees and undertakes to sign the relevant transfer documents accordingly without any claim, demand, whatsoever.
9. That the Vendee shall have the right to make publication in any news paper for the information of general public regarding sale/transaction of the said property at the cost and expenses of Vendee. All objections, disputes, litigations, if arises against said publication, shall be cleared, suffered and removed by the Vendor at his own cost, risk & expenses prior to the date of final payment.
10. That the Vendor hereby agrees and undertakes to extend full-cooperation to be required in future by him for proper transfer of title of the said property in favour of the Vendee or his nominees(s) and for transfer/mutation purposes etc., without hesitation, dillydally, demand, claim whatsoever and to present himself before the relevant authorities, offices, departments.
11. That in case it is found that the title and rights of the Vendor were legally defective and there were found any impediments in the transfer in favour of the Vendee, the Vendor hereby undertakes and agrees to refund the full paid amount to the vendee and also indemnify the Vendee against all losses, litigations, suits, claims, objection, disputes whatsoever.
12. That transfer fees, capital value tax, cost of stamp duty, registration charges, in respect of the said property shall be borne by the Vendee alone.

IN WITNESS WHEREOF the parties above named have set and subscribed their respective hands, the day, month and the year first above written."

6. It is evident from a perusal of the contract that the remainder of the purchase amount was divided into two distinct

sums. The first sum was stated as a "further sum" and was set at Rs.3,415,000/-, while the second sum was described as a balance payment of Rs.19,850,000/- (see Clause 2 of the contract). First, we take up the timeline related to the payment of a further sum of Rs.3,415,000/-. Be it noted here that the whole contract was typed save a few specific items: the date on which the contract was made, the date by which payment of Rs.3,415,000/- was due, and a few figures stated in Clause (1) of the contract, which were handwritten. However, the payment for Rs.3,415,000/- was stipulated to be made by the 20th of March, 2013. The vendor claimed that payment of Rs.3,415,000/- had not been made by the stated deadline, arguing that this failure resulted in the extinction of his right to seek specific performance of the contract, suggesting instead that the contract ought to be cancelled. On the contrary, the vendee's plea was that the date of 20th of March, 2013 was a slip of hand, as it was impossible for the payment to be completed prior to the contract's signing date of 26th of March, 2013. He asserted that, in fact, the correct date was the 20th of May, 2013. Upon reflection, we agree that the reference to the 20th of March, 2013 for the payment of Rs.3,415,000/- was a slip-up. The pertinent question that arises is whether this payment of a further sum was strictly time-bound and if noncompliance would incur any penalties. It appears that there was an intended timeframe for the payment of Rs.3,415,000/-. What was that? It is shrouded in mystery, as neither party had presented convincing evidence to clarify this matter. So, the actual payment date of the further sum cannot be ascertained. Given the circumstances surrounding this case, determining that date is not even necessary. There are two primary reasons for this conclusion. The first is that there is no evidence indicating that the vendor made any effort to inform the /

vendee that the payment had not been made as scheduled. The second is that the contract does not impose any strict requirements regarding the timely payment of the sum of Rs.3,415,000/-. The only consequence of this payment was that it made the vendor responsible for fully paying off the debt or loan associated with the property in question and obtaining a clearance certificate or No Objection Certificate (NOC) from the relevant bank (see Clause 4 of the contract). This responsibility could be easily fulfilled because, long before the date intended for registration of the sale deed, the vendee, by the 20th of May, 2013, had already paid Rs.6,815,000/-, an amount that the vendor accepted without any protest or objection. This fact is supported by two receipts dated 19th of April, 2013 (Exh.6/5) and 20th of May, 2013 (Exh.5/6). The vendor has not disputed the validity or execution of these receipts. Therefore, there is no need to consider oral evidence in light of these two documents. Under these circumstances, the vendor cannot base his claim on the incorrect date specified in the contract for the payment of Rs.3,415,000/-and, as a result, is estopped from raising any concerns regarding the payment of this further sum.

7. This leads us to consider the circumstances surrounding the balance payment of Rs.19,850,000/-. Before delving into that analysis, it is important to highlight that the property in question was mortgaged to the Bank, serving as collateral for the loan at the time the contract was executed. In this context, a conjoint reading of Clauses 2, 3, and 5 of the contract reveals that the responsibility for the balance payment by the vendee depended on the vendor fulfilling specific obligations. These obligations included (a) securing a Clearance Certificate or No Objection Certificate (NOC) from the Bank, (b) settling all /

outstanding dues, debts, claims, loans, mortgages, taxes, and any other liabilities associated with the property, (c) ensuring that the property's mutation was duly processed in the vendor's name, and (d) completing all necessary sale formalities, which encompassed the registration of the sale deed or granting a General Power of Attorney in favour of the vendee or his nominee. All of these conditions were expected to be fulfilled by the vendor on or before the 15th of August, 2013 deadline. Only after successfully meeting these prerequisites was the vendee obligated to pay the outstanding amount. However, evidence indicates that as late as the 9th of September, 2013, the property remained mortgaged (Exh.X/10), which severely undermined the vendor's position. Consequently, the penalty of forfeiture stipulated in Clause (4) of the contract could not legitimately be invoked, nor could the vendee be deemed at fault for any failure to meet contractual obligations. In fact, it seems clear that there was no opportunity for the vendee to proceed with the balance payment. Despite this, the vendor attempted to shift the burden of his shortcomings onto the vendee by issuing a Notice dated 2nd of September, 2013, claiming that the contract had been cancelled due to the alleged non-payment of the balance amount. Subsequently, on the 4th of September, 2013, the vendor filed a suit seeking a decree for the cancellation of the contract. This manoeuvre appears to be gamesmanship, violating the well-established legal maxim *nullus commodum capere potest de injuria sua propria*, which means no one should benefit from their wrongdoing. It is important to note that before the final hearing of the suit, the vendee had demonstrated his commitment by depositing a sum of Rs.19,800,000/- with the Court, which notably exceeded the required amount by Rs.765,000/-. This detail reinforces the

conclusion that the vendee had consistently been ready and willing to fulfill his contractual obligations, leading us to the equitable inference that the scales of justice lean favourably towards the vendee in this matter.

8. The outcome of this matter is that the decree issued by the High Court in favour of the vendee is completely justified and shows no grounds for objection. Consequently, this petition lacks merit and is hereby dismissed. Leave to appeal is denied.

9. Since the main petition (CPLA No.812-K of 2022) has been finally decided by us today, all pending miscellaneous applications therein have become infructuous and are accordingly disposed of.

JUDGE

JUDGE

I have appended my own separate note.

JUDGE

ISLAMABAD, THE

21st of May, 2024

NOT APPROVED FOR REPORTING

Rashid*/

Irfan Saadat Khan, J. The *lis* before us pertains to a Sale Agreement, dated 26.03.2013, ("**Agreement**") for the sale of land bearing number 72/III measuring about 550 square yards, located at 16th Lane, Phase VII DHA, Karachi, along with the construction thereon, between Zeeshan Pervez, who is represented by his legal heirs, ("**Petitioner/Vendor**") and Muhammad Nasir ("**Respondent/Vendee**").

2. The Petitioner/Vendor is aggrieved by the short Order of the High Court of Sindh at Karachi, dated 24.05.2022 ("**Impugned Judgment**"), whereby the High Court Appeal No. 194 of 2020, under s. 3 of the Law Reforms Ordinance, 1972, against the consolidated judgement¹, dated 31.08.2020, rendered in Suit 1114 of 2013 (filed by the Petitioner/Vendor) and Suit 1214 of 2013 (filed by the Respondent/Vendee), was dismissed.

3. The facts pertaining to the *lis* are that after having executed the aforementioned Agreement, the Petitioner/Vendor filed a Suit (1114 of 2013) wherein he sought the cancellation of the Agreement on the premise that the Respondent/Vendee was unable to pay the requisite amounts within the stipulated timeline. Whereas, the Respondent/Vendee filed a separate Suit (1214 of 2013) wherein he sought specific performance of the Agreement and pled that the Petitioner/Vendor was unlawfully reneging from the binding obligations placed upon him by virtue of the Agreement. Both the Suits were consolidated, vide Order, dated 09.10.2014, and proceeded in the usual manner: written statements filed, issues framed, pro and

¹ Rendered by the High Court of Sindh at Karachi exercising its Original Jurisdiction.

contra evidence recorded and thereafter, final arguments were made by the respective parties. After this process, the Single Judge, vide Order, dated 31.08.2020, decreed the consolidated Suits, in the following terms:

“The Vendee has made out a fit case for grant of specific performance of the Agreement, whereas, the Vendor has been unable to demonstrate and/or prove any grounds to merit cancellation therefor. Therefore, Suit 1214 of 2013 is decreed, with costs, in favour of the plaintiff with directions to the defendant to forthwith execute a conveyance deed in favour of the Plaintiff with respect to the Suit Property and deliver peaceful possession thereof. The balance sale consideration, being Rs. 19,035,000, and profit accrued thereon, may be paid by the Nazir to the defendant upon execution of conveyance deed and delivery of the Suit Property to the Plaintiff. The excess amount deposited with the Nazir, being Rs. 765,000/- and profit accrued thereon, shall be returned to the plaintiff. Suit 1114 of 2013 is hereby dismissed with costs.”

As mentioned prior, the Appeal filed against the aforementioned consolidated judgment, was dismissed via a short Order, dated 24.05.2022. On 04.08.2023, the High Court, in its reasoning for the short Order², dated 24.05.2022, stated the following:

“In view of the hereinabove facts and circumstance of the instant case, we are of the considered view that the appellant has failed to make out a case requiring this Court to interfere with the impugned judgment and decree passed by the learned Single Judge, which prima facie does not suffer from any factual error or legal infirmity. Whereas, the findings as recorded by the learned Single Judge are based on proper reading of the evidence produced by the parties in both the suits and correct interpretation of the terms of the sale agreement. Accordingly, instant High Court Appeal was dismissed vide our short order dated 24.05.2022 and above are the reasons of such short order.”

4. Mr. Abdul Qadir Khan, AOR/ASC appeared through video link, before us on behalf of the Petitioner/Vendor and contended that the impugned judgment did not appeal to a prudent mind, as the High Court had failed to interpret the Agreement properly and has ignored the two successive breaches, of the timeline stipulated in the Agreement, by the Respondent/Vendee. Elaborating upon these two

² Made available to this Court by the Petitioner vide C.M.A. No.881-K/2023, filed in August 2023.

breaches, learned Counsel for the Petitioner/Vendor stated that the total sale consideration to be paid in respect of the property was PKR 25,850,000/-, out of which the Respondent paid a sum of PKR 2,585,000/-, on the date of signing of the Agreement; however has failed to pay PKR 3,415,000/-, as determined in the Agreement, by the stipulated timeline of March 2013, and has also failed to pay the remainder of the total sale consideration, PKR 23,265,000/-, by the stipulated date of 15.08.2013. Learned Counsel for the Petitioner/Vendor further submitted that the High Court had failed to consider that the Respondent/Vendee's Suit for specific performance of the agreement was not maintainable as prior to the institution of the said Suit, the Petitioner/Vendor through legal notice, dated 02.09.2013, had already revoked the Agreement, and thus no cause of action existed in the Respondent/Vendee's favour, when his Suit was instituted on 27.09.2013. Learned Counsel further stated that the High Court had also failed to realise that there was no breach of Agreement on the part of the Petitioner/Vendor since the property was mortgaged, the Petitioner/Vendor had already cleared all dues on the property, had affected the release of the documents from the bank along with a no-objection-certificate ("**NOC**"), and also applied for redemption of the property; therefore, the Petitioner/Vendor was all set to sell the property but the Agreement was frustrated due to the non-performance and breaches on the part of the Respondent/Vendee by failing to pay the remainder of the sale consideration. In light of these averments, learned Counsel for the Petitioner/Vendor prayed for the impugned judgment, dated 24.05.2022,³ and the judgement and decree dated 31.08.2020, passed by the learned Single Judge, be set aside.

³ Detailed reasons of which were given vide Order dated 04.08.2023.

5. Mr. Muhammad Vawda, ASC appeared on behalf of the Respondent/Vendee and defended the impugned judgment and that passed by the learned Single Judge by submitting that the Petitioner/Vendor had failed to point out factual errors or legal infirmities in the impugned judgment or that of the learned Single Judge; and that the two judgments were based on correct appreciation of the evidence recorded by the learned Single Judge and rightly endorsed by the Division Bench of the said High Court. Learned Counsel for the Respondent/Vendee contended that the Respondent/Vendee had successfully discharged the onus of proof to seek a declaration with regard to specific performance of the Agreement and the said declaration had rightly been granted to the Respondent/Vendee, as the Petitioner/Vendor had failed to perform the conditional aspects of the Agreement. He further submitted that the Respondent/Vendee had not breached any term of the Agreement, a fact which had been recognised by the two *fora* below and therefore no case for interference by this Court was made out. The learned Counsel therefore prayed for dismissal of the instant petition, as being devoid of any merit and uncalled for.

6. We have heard the learned Counsel for both the parties at some length and have perused the record with their assistance.

7. The ability to contract is not merely an act of legislative grace; it is a capability that, in practical application, is essential for an individual to live and conduct daily affairs.⁴ Therefore, it is essential, that the Courts of this country do not hamper the ability of this country's populace to contract as they see fit, as long as the contract

⁴ United States v. Alabama 2012 U.S. App. LEXIS 17516

is legal and in accordance with the law. Courts should only interfere with contracts, if they are illegal or if one party to a contract uses the contract to disadvantage or deprive the other party to the contract by choosing self-serving interpretations. In this backdrop, since certain terms of the Agreement, which concern the stipulated timeline of payment of consideration and are the main source of contention between the parties to this *lis*, it would be pertinent to reproduce them hereunder:

"This Agreement to Sell is made at Karachi, this 26 day of March 2013...

That the Vendor has received from the Vendee a sum of Rs.2,00,000/- (Rupees Two Lac only) through Cheque No. 0041740420 dated 22/03/2013 drawn on Faysal Bank Ltd, Karachi, and now on signing of this Agreement a further sum of Rs.23,85,000/- (Rupees Twenty-Three Lac Eighty-Five Thousand only) THROUGH No. 01700373 Rs. 1,900,000/- FBL H.O 0041740422 Rs.485,000/- FBL H.O. both the sums totaling to Rs. 25,85,000/- (Rupees Twenty-Five Lac Eighty Thousand only) being the advance part-payment towards sale consideration of the said property, receipt of which the Vendor doth hereby fully admit and acknowledge separately.

2. That a further sum of Rs. 34,15,000/- (Rupees Thirty-Four Lac Fifty Thousand only) shall be paid by the Vendee to the Vendor on or before 20 March 2013 and balance payment of Rs. 1,98,50,000/- (Rupees One Crore Ninety-Eight Lac Fifty Thousand only) shall be paid by the Vendee to the Vendor at the time of handing the vacant and peaceful physical possession of the said property and completion of sale formalities including registration of Sale Deed/General Power of Attorney in favour of the Vendee or his nominee(s) on or before 15/08/2013...

4. That after the payment of Rs.34,15,000/- the Vendor shall be responsible to full pay off the debt/ loan against the said property and obtain the Clearance Certificate/NOC from the Bank concerned."

A cursory glance of the terms of the Agreement, reproduced above, show that the Agreement's inception took place on 26.03.2013, and it has been acknowledged therein that a sum totalling to PKR 2,585,000/- had already been paid in advance by the Respondent/Vendee to the Petitioner/Vendor, as part-payment towards the total sale consideration of PKR 25,850,000/-. As per clause 2 of the Agreement, a further sum of PKR 3,415,000/- was to

be paid by the Respondent/Vendee to the Petitioner/Vendor, after which, as per clause 4, the Petitioner/Vendor would be responsible for paying off the debt owed on the property (since the property was mortgaged to Summit Bank) and obtaining a NOC from the said bank. Learned Counsel for the Petitioner/Vendor maintained before us that the PKR 3,415,000/- was payable by 30.03.2013 and since the Respondent/Vendee had not done so, it constituted the first breach. The Agreement presented before this Court, clearly shows a misprint with regards to the date on which the PKR 3,415,000/- sum towards the total sale consideration was payable, which also happens to be an admitted position before the two *fora* below. The Single Judge, in the judgement dated 31.08.2020, has dealt with the issue in the following manner:

"16. The learned counsel for the Vendee argued that the date was erroneously depicted as 20.03.2013, and the same was supposed to read 20.05.2013. Although the Vendor had pleaded, in the plaint in Suit 1114 of 2013 and in the legal notice referred to supra, that the relevant date was correctly stated to be 20.03.2013, however, during final arguments the Vendor's counsel conceded that the date was in fact an inadvertent misprint, however, it was supposed to be read as 30.03.2013, and not 20.05.2013 as alleged by the Vendee. Prior to proceeding further it merits to be recorded that the factum of the relevant date being a misprint is an admitted position, therefore, all that remain to be done is to ascertain as whether the evidence supports the alternate date theorized by the Vendor or the Vendee.

17. Per Vendee's counsel it was absurd for an agreement to require a future payment prior in time to its date of execution. It was demonstrated that the amounts in excess of that sought per clause 2 of the agreement were received by the Vendor up until May 2013 without any objection or demur, hence, the belated plea was contradicted inter alia by the conduct of the Vendor himself.

The Vendor has specifically pleaded that the date per the Agreement, 20.03.2013, was the correct date and had predicated his claim for rescission of the Agreement thereupon. However, in a complete departure from his pleadings had deposed that the said date was 30.03.2013. The subsequent interpretation of the date was also iterated by his counsel during final arguments. No rationale was provided for not mentioning the appropriate date in the legal notice or the plaint that was filed in Suit 1114 of 2013.

13. The Agreement is dated 26.03.2013 and records the payments that have already been made thereunder, until the date of execution, in clause 1 thereof. The Agreement specifically mentions three instruments, particularized therein, and the same is also corroborated by the certification of Faysal Bank Limited available in evidence. Clause 2 then says that *'That a further sum of shall be paid ... on or before March (sic) 20,2013'*. It is prima facie apparent that the amount in contemplation is an amount to be paid post execution of the Agreement. The evidence denotes that the Vendor

accepted 2 payments from the Vendee post execution of the Agreement, vide pay order dated 11.04.2013 and 20.05.2013, demonstrably realized per the admission of the Vendor's counsel and the bank statement. There is nothing on the record to show any attempt by the Vendor to point out to the Vendee that payment/s, purportedly due by 30.03.2013, have not been received in time. On the contrary the Vendor demonstrably and admittedly received and realized the relevant payment in the third week of May 2013."

(EMPHASIS ADDED)

The Division Bench of the High Court in the impugned judgment has agreed with the interpretation of the date, with regards to the payment of the PKR 3,415,000/-. A useful rule to remember vis-à-vis interpretation of contracts is that the words of written documents are interpreted more forcibly against the party putting forward the document.⁵ The rule is based on the principle that a party putting forward the wording of a proposed agreement may be assumed to have looked after its own interests, is responsible for the ambiguities in its own expression, and has no right to induce another to make a contract on the supposition that the words mean one thing, and then to argue for a construction by which they would mean another thing, more to its advantage.⁶ In Latin, this rule is known as *contra proferentem* and has been part of English law since the medieval period.⁷ A full version of the rule was given by Edward Coke: '*verba cartarum fortius accipiuntur contra proferentem,*' or 'the words of deeds are to be taken more strongly against the one who put them forward.'⁸ Having said that, we have pondered over the misprint of the date and have arrived at the irresistible conclusion that if the inception of the contract took place on 26.03.2013, then how could the payment of PKR 3,415,000/- under the contract be demanded on

⁵ *The Terms of the Contract*. Beatson, J., Burrows, A., & Cartwright, J. (2020). *Anson's Law of Contract*. Oxford University Press.

⁶ *ibid.*

⁷ McCunn, J. (2019). The contra proferentem rule: Contract law's great survivor. *Oxford Journal of Legal Studies*, 39(3), 483-506.

⁸ *ibid.*

20th March 2013, and that too when the Petitioner had admittedly already paid PKR 2,585,000/-, in advance? This question has remained unanswered before the lower *fora*.

8. The record reveals that the Petitioner/Vendor has taken divergent stances with regards to the date of payment of PKR 3,415,000/-, as at page-45 of the paper book submitted before this Court, the said date was mentioned as 20.03.2013; at page-91 of the paper book as March 2013 with no specific date; and at page-110 of the paper book as 30.03.2013. It is also worth noting that in the cross-examination of the Petitioner/Vendor⁹, he has admitted that the date of 20.03.2013, "in the Agreement, was a mistake as payment cannot be made before the date of the Agreement", which statement in our view belies his own assertions made via the legal notice, dated 02.09.2013, and further depositions made in the instant matter before the Single Judge and the Division Bench.

9. Having said that, in *Modi and Co*¹⁰ the Indian Supreme Court was of the view that in constructing a contract, it is legitimate to consider the surrounding circumstances for ascertaining the intention of the parties; hence, the Court observed:

"It is true that when a contract is reduced to writing we must look only to that writing for ascertaining the terms of the agreement between the parties but it does not follow from this that it is only what is set out expressly and in so many words in the document that can constitute a term of the contract between the parties. If upon a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of the contract can be expressed or there can be a necessary implication of a term from what has been expressed in the contract. The question therefore resolves in the ultimate analysis upon the construction of the terms of the contract between the parties. In this connection it is well-established that in construing such a contract it is legitimate to take into account the

⁹ Available at page-22 of CMA No.630-K of 2022.

¹⁰ *Modi and Co v. Union of India* (AIR 1969 SC 9)

surrounding circumstances for ascertaining the intention of the parties.”

As noted above, Courts should refrain from substituting the wisdom of the contracting parties with their own but in the instant matter we are left with no recourse but to interpret the intention of the two contracting parties by considering the surrounding circumstances. Reliance on the *contra proferentem* rule and the aforementioned case-law leads us to the conclusion that a reasonable person, considering the context of the contract, ought to be able to identify its meaning without any ambiguity and if the ambiguity persists, the meaning that accords best with common sense would prevail.¹¹ Therefore, in light of the admitted misprint, we find ourselves in agreement with the interpretation of the Single Judge, reiterated in the impugned judgement, with regards to the date of payment of PKR 3,415,000/- and have therefore arrived at the conclusion that the payment was indeed made within time and thus does not constitute as breach of the Agreement, as pressed for by the learned Counsel for the Petitioner/Vendor. Nevertheless, it is also pertinent to mention s. 56 of the Contract Act, 1872, which reads:

“56. Agreement to do impossible act: An agreement to do an act impossible in itself is void.”

If we were to accept the interpretation of the Agreement being pressed by the learned Counsel for the Petitioner/Vendor, we are afraid that the Agreement would squarely fall under s. 56 of the Contract Act, 1872 as the Respondent/Vendee cannot go back in time and pay a sum which was due even before the inception of the Agreement.

¹¹ McCunn, J. (2019). The *contra proferentem* rule: Contract law's great survivor, *Oxford Journal of Legal Studies*, 39(3), 483-506.

10. This brings us to the learned Counsel for the Petitioner/Vendor's assertions with regards to the second breach. Learned Counsel stated that the remainder sum of the total sale consideration was to be paid on or before 15.08.2013 by the Respondent/Vendee as per clause 2 of the Agreement, so that the sale envisioned in the Agreement could be concluded. With respect to the learned Counsel for the Petitioner/Vendor, we do not agree. Before the process envisioned in clause 2 of the Agreement could be completed, there is a condition which kicks in by virtue of clause 4 of the Agreement, which is:

"after the payment of Rs.34,15,000/- the Vendor shall be responsible to full pay off the debt/ loan against the said property and obtain the Clearance Certificate / NOC from the Bank concerned."

(EMPHASIS SUPPLIED)

After the Petitioner/Vendor had received the payment of PKR 3,415,000/- in the third week of May 2013, which has been interpreted as the stipulated timeline for the said payment herein above, it was the Petitioner/Vendor's responsibility to pay off the outstanding debt and obtain a NOC from the bank concerned. This was a necessary condition to be fulfilled by the Petitioner/Vendor to conclude the sale by 15.08.2013. Clause 2 and clause 4 of the Agreement point towards the Agreement being a conditional contract. A conditional contract is a contract the very existence and performance of which depends upon the happening of some contingency or condition expressly stated therein.¹² The responsibilities of the Petitioner/Vendor have been stated as expressly as possible in clause 4 and a failure to fulfil those responsibilities on part the Petitioner/Vendor points towards a breach of this conditional contract/agreement. This breach in turn

¹² Buchanan v. Johnson 1979 Tenn. App. LEXIS 384

gave the Respondent/Vendee an option to void the Agreement by virtue of s. 55 of the Contract Act, 1872, part of, which reads:

“55. Effect of failure to perform at fixed time, in contract in which time is essential. When a party to a contract promises to do a certain thing at or before a specified time or certain things at or before specified times, 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.”

Whether time is the essence of a contract always depends upon the wordings of an agreement, intention of the parties, and above all is a question of fact. This Court in *Jaiwanti Bai*¹³ has observed that generally in a sale of immoveable property, time is not the essence of the contract, unless it is made so. Moreover, in *Muhammad Iqbal*¹⁴ this Court held that:

“In relation to contracts of immovable property the rule is that time ordinarily is not the essence, however, this by no means is an absolute rule and it is always open to the party, who claims exception thereto, to establish otherwise from the contents/text, letter and spirit of the agreement and/or from the intent and conduct of the parties, as well as the attending circumstances.”

There has been a repeated reliance before us and the *fora* below and in the pleadings of the Petitioner at all *fora* that the stipulated timeline was the essence of the contract and thus when the promisor (Petitioner/Vendor in this case) had by virtue of clause 4 agreed to pay off the outstanding debt and obtain a NOC from the bank concerned after he had received the payment of PKR 3,415,000/- and then had failed to do so, then the Agreement became voidable at the option of the promise (Respondent/Vendee). Therefore, the learned Counsel for the Petitioner/Vendor's assertions with regard to the second breach and that the suit for specific performance of the agreement was not maintainable as prior to the institution of the said

¹³ Mst. Jaiwanti Bai v. Messrs Amir Corporation (PLD 2021 SC 434)

¹⁴ Muhammad Iqbal v. Mehboob Alam (2015 SCMR 21)

suit, the Petitioner/Vendor through legal notice, dated 02.09.2013, had already revoked the Agreement, and thus no cause of action existed in the Respondent/Vendee's favour when his Suit was instituted on 27.09.2013, are meritless.

11. If we were to treat the Agreement between the parties as one where time was not the essence of the contract because, as noted above, it is well settled law that in transactions of immoveable property time is not the essence of the contract¹⁵, even then the claim of the Petitioner/Vendor would fail as the second part of s. 55 of the Contract Act, 1872, reproduced below, would come into play:

“55. Effect of such failure when time is not essential. If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.”

By virtue of this limb of s. 55 of the Contract Act, 1872, it is quite clear that in agreements where time is not of the essence, the contract does not become voidable by the failure to do such thing at or before the specified time; and the only remedy available is to the promisee (the Respondent/Vendee in this case), which is that they are entitled to compensation from the promisor (the Petitioner/Vendor in this case).

12. There is another aspect of the Respondent/Vendee's suit for specific performance. Recently, this Court, in *Masood Ahmad Bhatti*¹⁶ whilst reiterating settled law, opined:

¹⁵ *Indira Kaur v. Shri Sheo Lal Kapoor* (AIR 1988 Supreme Court 1074); *M.P Housing Board v. Progressive Writers & Publishers* (AIR 2009 SC 1585); *Muhammad Hussain v. Dr. Zahoor Alam* (2010 SCMR 286).

¹⁶ *Masood Ahmad Bhatti v. Khan Badshah* (2024 SCMR 168)

“Even otherwise, it is now well settled that where the vendor refuses to accept the sale consideration amount, the vendee seeking a specific performance of the agreement to sell is essentially required to deposit the amount in the Court. The vendee has to demonstrate that he has been at all relevant times ready and willing to pay the amount and to show the availability of the amount with him. A vendee cannot seek enforcement of reciprocal obligation of the vendor unless he is able to demonstrate that not only his willingness but also his capability to fulfil his obligations under the contract.”

A bare perusal of the judgement of the Single Judge shows that the Respondent/Vendee not only submitted the remainder of the sale consideration owed to the Petitioner/Vendor before the Court but deposited an amount well-above the remainder of the sale consideration owed, which was then directed by the Single Judge to be returned to the Respondent/Vendee. The record also reveals that when the Petitioner/Vendor fell short of funds to pay the liability he owed to the bank, he approached the Respondent/Vendee for payment of PKR 730,000/-, which was so done by the Respondent/Vendee on 11.04.2013 to the Petitioner/Vendor's bank, namely Summit Bank, to enable him to obtain NOC from the said bank, which even was acknowledged by the Petitioner/Vendor vide receipt dated 19.04.2013.¹⁷ This conduct of the Respondent/Vendee shows that he had indeed been ready at all relevant times to conclude the Agreement and acquire the property but has been hindered by the conduct of the Petitioner/Vendor, who has repeatedly tried to establish breaches on part of the Respondent/Vendee and then tried to use the Courts to get a rubber stamp of approval on self-serving interpretations of the Agreement. This Court in *Rao Abdul Rehman (Deceased)*¹⁸ has observed:

“The person seeking specific performance has to establish that he is enthusiastic and vehement to act upon his obligations as per the contract but the opponent is refusing or delaying its execution.”

¹⁷ Available as Annex D-1 at page-125 of CMA 4825 of 2024.

¹⁸ *Rao Abdul Rehman (Deceased) v. Muhammad Afzal (Deceased)* (2023 SCMR 815)

Therefore, we have no hesitation in concluding that the Respondent/Vendee has not only exhibited that he was enthusiastic about concluding the Agreement but has also acted vehemently in trying to fulfil his obligations.

13. Be that as it may, it is pertinent to state here that as a general rule, either party to a contract for the sale of land is entitled to sue for specific performance of agreement.¹⁹ This is because the Vendor is parting with a piece of land, which is unique and cannot readily be replaced in the market, and the Vendee is entitled to a reciprocal remedy, because he/she acquires an immediate equitable interest in the land by virtue of the contract/agreement.²⁰

14. The upshot of the aforementioned discussion is that there was no breach on part of the Respondent/Vendee rather it was on the part of the Petitioner/Vendor, therefore the recourse to a Suit for Specific Performance was the appropriate remedy for the Respondent/Vendee. With that being said, the Single Judge through judgment, dated 31.08.2020, arrived at the correct conclusion, and the Division Bench vide impugned judgment, dated 24.05.2022 (detailed judgment of which was given on 04.08.2023), rightfully declined to interfere; therefore, Leave to Appeal is refused and this Petition is dismissed, with no order as to costs. Accordingly, CMA.572-K of 2022 is also disposed of.

¹⁹ *Specific Remedies*. Beatson, J., Burrows, A., & Cartwright, J. (2020). *Anson's Law of Contract*. Oxford University Press.

²⁰ *ibid.*