

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

**Present:**

MR. JUSTICE MUSHIR ALAM  
MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL  
MR. JUSTICE YAHYA AFRIDI

**C.M.A.4053/2018 in C.A.637/2018 and C.A.637/2018**

*(On appeal from the judgment dated 13.2.2018 passed by the Islamabad High Court, Islamabad in RFA No.166/2013)*

Mst. Samina Riffat & others

(In both cases)

**...Applicants/Appellants**

**VERSUS**

Rohail Asghar & others

(In both cases)

**...Respondents**

For the applicants/  
appellants:

Mr. Haroon Irshad Janjua, ASC  
Mr. Mehmood A. Sheikh, AOR

Respondent No.1:

Mr. Junaid Iftikhar Mirza, ASC  
Syed Rifaqat Hussain Shah, AOR

Respondent No.4:

Ch. Riasat Ali Gondal, ASC  
Raja Abdul Ghafoor, AOR

Date of Hearing:

4.5.2020

**ORDER**

**MUSHIR ALAM, J-.** This appeal arises out of the impugned judgment dated 13.2.2018, passed by the Islamabad High Court, Islamabad, in RFA No. 166/2013. Respondent No. 1, on 4.1.2005, filed a suit for specific performance of sale agreement dated 4.10.2004 before Civil Judge. Suit was contested by the Appellant (Defendants No. 2 and 3), filed written statement on 7.03.2005 it was specifically pleaded that they are '*Pardah Nasheen*', defendant No.1 being their brother took undue advantage of relationship, struck the deal to their disadvantage. It was specifically pleaded that since the plaintiff failed to pay balance consideration within period stipulated therein. It was pleaded that through notice dated 08.12.2004 and reply dated 28.12.2004 to plaintiff notice deal was

cancelled and, earnest amount in terms of clause 6 of the agreement was forfeited. In paragraph 4, again it was specifically pleaded that the agreement dated 4.10.2004 for failure to pay balance consideration, within stipulated period, is cancelled and earnest money stand forfeited. Defendant No. 1, who is brother of appellant, filed a conceding written statement favouring the Plaintiff.

2. Alongwith the suit an application under Order XXXIX Rules 1 & 2 read with Section 151 CPC was filed by Respondent No. 1, seeking restraining order against the appellants not to sell/transfer the suit property. The learned trial court on 19.7.2005 while deciding the application on merits directed the respondent No.1/vendee *"to deposit the balance sale consideration amounting to Rs.1,50,00,000/- (in terms Clause 3 of the sale agreement) within one month otherwise the stay granted in favour of Plaintiff shall be deemed to be cancelled"*. It is matter of record the balance sale consideration, as directed was not deposited.

3. The suit proceeded on merits and Khalid Mehmood, duly appointed special attorney of Plaintiff Rohail Asghar, was examined as *PW-1*. In cross examination, he admitted that contesting Defendants (*appellants herein*) are '*Purdah Nasheen*' ladies. They did not sign the agreement in their presence; and their signatures were procured later by the Defendant No.1. He narrated in vivid detail how the earnest money through pay order was paid to the appellants here in. However, He could not furnish any details of payment of Rs. Twenty lacs to Defendant No.1, though the witness denied the suggestion that the sale agreement was procured from the Defendants No.2 and 3

(appellant herein) in concert with their brother at value much below the market price and no advance was paid to their brother. He admitted in cross examination that the "*present market value of the suit property is 4 to 5 crores*" he declined to purchase the property at the current market value. As regard time fixed for performance and clause providing for forfeiture of earnest money he deposed as follows.

EX-P.2" میں یہ شرط موجود ہے کہ اگر معاہدہ کے دو مہینے کے اندر بقیہ رقم ادا نہ کی گئی تو ادا کی گئی رقم ضبط ہو جائے گی۔ یہ درست ہے کہ دو ماہ کے اندر معاہدے میں نے بقایا نقد رقم نہ دی تھی۔ مجھے تینوں بہن بھائیوں کے حصوں کے بارے میں معلوم نہ ہے۔ دوران دعویٰ حکم امتناعی کی درخواست کے فیصلہ کے مطابق بشرط ادائیگی بقایا رقم میں نے بقایا رقم عدالت میں جمع نہ کروائی ہے۔"

It may be observed that the Defendant No.1 did not cross examine the plaintiff's witness nor adduced any evidence.

4. Mst.Samena Riffat, appellant /Defendants 2 appeared as DW-1 and was cross examined by the Plaintiff only. In her cross examination she categorically stated that "*we sisters are still ready to sell the property to the Plaintiff at present market value*"

5. After recording the evidence, suit was dismissed by the learned trial court on merits with cost of Rs.10,000/- vide judgment dated 7.10.2013. Which Judgment came up for scrutiny in Regular First Appeal No. 166 of 2013. Learned Division bench of the High Court though maintained the judgment and decree of dismissal of the suit for specific performance. In paragraph 13 of the impugned judgment, returned with a conclusion that "*It is admitted position that the appellant could not show compliance with the said order. We are of the view that had the appellant*

*been in a position to pay the balance sale consideration within a period of two months from the date of execution of sale agreement or even prior to the filing of the suit , he would have shown compliance with the order of the court dated 19.07.2005 passed by the learned civil Court by depositing Rs. 1,50,00,000/- in court within a period of one month from the date of passing of said order. Before or even after the institution of suit, the appellant did not show his bonafide by making pay order or drawing a cheque in favour of the Respondents No.1 and 3 (appellant herein) for an amount equivalent to the balance consideration. As regards the Appellant's plea that the Respondents No.1 to 3 was supposed to obtain an NOC from the CDA for transfer of suit house, there is no such obligation imposed on respondent No. 1 to 3 under the terms of the agreement to sell". Learned Bench of the High Court under the given fact and circumstances of the case while relying on the case of *Mst. Gulshan Hamid v. Kh. Abdul Rehman*<sup>1</sup> came to a conclusion that that the time was essence of the contract, maintained the dismissal of suit and appeal was dismissed. However, in the concluding paragraph 18 of the impugned judgement held: -*

*"In view of the above, we do not find any merit in this appeal, which is accordingly dismissed with no order as to costs. Since no notice was served by respondents No.2 and 3 on the appellant that the earnest money would be forfeited if the balance sale consideration was not paid within the time stipulated in the agreement to sell, it is ordered that respondents No.2 and 3 shall return the earnest money received by them alongwith profit as would be payable on defense saving certificates of the National Savings to the appellant. Respondent No.2 (Mst. Samina Riffat), appeared as DW-1, and deposed that she and her sister had each received Rs.10,00,000/- from the appellant. As regards*

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<sup>1</sup> 2010 SCMR 334

*respondent No.1, since he in his written statement had expressed his willingness to perform the agreement, he is directed to return the earnest money amounting to Rs.20, 00,000/- without profit."*

6. Learned counsel for the appellants contends that the appellants alongwith their brother inherited the suit property, which was negotiated for sale by their brother through agreement noted above, for a total sale consideration of Rs.1,90,00,000/- out of which Rs.20,00,000/- (twenty lacs) was statedly paid to Shahid Mehmood respondent No. 2 (*brother of the appellants*), and ten lac each (i.e. 5.26% of total sale consideration) to the appellants herein. Balance consideration in terms of the agreement to sell dated 4.10.2004 was to be paid within two months in terms of Clause-3 of the agreement. Per Clause-5 and 6, on failure of vendors to transfer the property in terms of agreement they were liable not only to refund the advance together with equivalent sum as compensation and correspondingly on failure of the vendee to pay the balance sale consideration, the vendors were entitled to forfeit the earnest amount paid in advance.

7. It appears that respondent No. 1, instead of coming forth to perform his part of reciprocal obligation to pay the balance sale consideration within period stipulated, through notices called upon the appellants to comply with certain conditions, which were not the part of the agreement. Later on, respondent No. 1 filed a suit for specific performance on 4.1.2005; alongwith the suit, he filed an application under Order XXXIX Rules 1 & 2 CPC seeking ad-interim injunctive relief.

8. Learned trial court on 19.7.2005 directed the plaintiff/respondent *"to deposit the balance sale consideration of*

*Rs.1, 50, 00,000/- within one month in the court. Otherwise stay granted today in favour of plaintiff/respondent shall be deemed to as cancelled".* It is a matter of record that during trial of suit or even during pendency of RFA, balance consideration was neither offered nor deposited. Consequently, suit was dismissed, which was maintained in appeal. However, the learned Bench of the High Court deemed appropriate to direct refund of the earnest money and so also burdened them with payment of profit on the earnest amount as would be payable on Defense Saving Certificates to the respondent No.1 in terms of the last paragraph of the impugned judgment as reproduced hereinabove.

9. Learned Counsel for the appellant argued that it was concurrently held by both the court that it was the Plaintiff/Respondent No. 1 who was at fault and committed breach of the contract. It was urged that the learned bench on one hand relied upon the case of *Ghulam Hamid*<sup>2</sup> to conclude that *"By failing to pay the balance sale consideration in accordance with the said agreement or in compliance with the said order, the appellant cannot be considered to have done equity. This conduct of the appellant stripped him from bonafides and disentitled him for grant of equitable relief."* It was argued that once both the courts were at unison that the breach, if any, was on the part of Plaintiff, the defendant were justified to forfeit the earned amount which was well within the contemplation of the same agreement.

10. Learned counsel for the respondent No. 1 has appeared and defended the impugned para noted above. It is stated that since breach was on the part of the Petitioners/defendants 2 and

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<sup>2</sup> 2010 SCMR 334

the Respondent No.1/Plaintiff was not obliged to pay the balance sale consideration, the unless the Defendants procured the requisite NOC was obtained from the CDA.

11. In rebuttal it was urged by the learned Counsel for the Appellant that issue of NOC was raised merely to buy time and delay payment of balance consideration, which became due and payable within two (2) months from the date of execution of sale agreement dated 4.10.2004 within the contemplation of Clause 3 of the sale agreement. Respondent No.1 even failed to comply with the directions as contained in the order dated 19.7.2005 passed by the learned trial court. He further contends that unless, breach of contract on the part of petitioner/vendor was established; they cannot be burdened with return of forfeited amount that too with profit. It was urged that the direction contained in paragraph 18 of the impugned judgment is against the spirit of the agreement between the parties.

12. We have heard the arguments and perused the record. Entire controversy revolves around the terms of the agreement for sale and the bargain struck between the parties. Clauses 1, 3, 5 & 6 being relevant stipulated as follow: -

- 1. That all the liabilities, dues to the said property shall be cleared, paid by the sellers.*
- 2. That the purchaser has agreed to pay the remaining sum of Rs.1,50,00,000/- (Rupees One Crore Fifty Lac Only) to the sellers after Two months from the date of signing this agreement at the time of execution of sale deed in favour of purchaser or any of his nominee(s).*
- 3. That if the Sellers withdraw from this deal or not to transfer the said property in favour of the purchaser or any of his nominee(s) then they shall pay back the entire sale consideration already received from the purchaser along with an equal amount as compensation, or purchaser*

*will have the full right to get transferred the said property through the court of law, at the risk and cost of the sellers, in his own name or any of his nominee(s).*

5. *That if the Sellers withdraw from this deal or not to transfer the said property in favour of the purchaser or any of his nominee(s) then they shall pay back the entire sale consideration already received from the purchaser along with an equal amount as compensation, or purchaser will have the full right to get transferred the said property through the court of law, at the risk and cost of the sellers, in his own name or any of his nominee(s).*

6. *That if the Purchaser backs out from this deal or fails to pay the remaining consideration within prescribed period, then this deal will be considered canceled and the received earnest money will be forfeited."*

13.       Clauses as reproduced do not contemplate any obligation on the part of the appellants to obtain NOC, as rightly noted by the learned trial as well as the High Court. Learned counsel for the respondent No. 1 was not able to demonstrate from record that any dues against the property were outstanding. The respondent No.1 to avoid making payment of balance sale consideration cannot import or press any condition extraneous to the conscious bargain struck between the parties. Generally, in respect of sale of immovable property, time is not considered as of the essence of the Contract. However, parties may consciously strike a deal to make time essence of the contract by providing certain consequences for breach of reciprocal obligation casted upon them, in such cases, time is treated as essence of the contract<sup>3</sup>. In instant case, as could be noted that, where vendor backs out from the deal and avoid to execute conveyance deed, clause 5 of the agreement stipulated that "*then they shall pay back the entire sale consideration already received from the purchaser*

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<sup>3</sup> Mst.. Gulshan Hamid v. Kh. Abdul Rehman 2010 SCMR 334 Paragraph 15.



*along with an equal amount as compensation.” Likewise for failure of the vendee to perform his part of the obligation in terms of clause 6 “in event he backs out from this deal or fails to pay the remaining consideration within prescribed period, then this deal will be considered canceled and the received earnest money will be forfeited”. In terms of Section 51 of the Contract Act (IX of 1872); where a contract is dependent on discharge or performance of reciprocal promise or obligations to be performed or discharged. The Promisor need not perform his part of promise or obligation, unless the promisee, (here in this case the vendee) “is ready and willing to perform his reciprocal promise.” In cases arising out of sale of immovable property, a vendee seeking specific performance has to demonstrate his readiness and willingness to perform his part of reciprocal obligation as to payment of balance sale consideration. The question what is readiness and willingness to perform a contract was attended to by a learned division bench of the West Pakistan High Court (Karachi) in the case of *Abdul Hamid v. Abbas Bhai- Abdul Hussain*.<sup>4</sup> It was held<sup>5</sup> that “In the first place, willingness to perform ones contract in respect of purchase of property implies the capacity to pay the requisite sale consideration within the reasonable time. In 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*

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<sup>4</sup> PLD 1959 (WP). Karachi 629

<sup>5</sup> Ibid 632

*completed.”* As noted above, the learned trial court vide order dated 19.7.2005 was indulgent in giving one months’ time beyond the period agreed in the sale agreement, to deposit balance consideration, which was not availed nor any attempt was made to deposit the amount during the pendency of the appeal. Since there is nothing on record to show, that the Appellants/Defendant 2 and 3 committed any breach, mere observation of the appellate court that since the Defendants 2 and 3 did not issued any notice making time essence of the contract is not justified under facts and circumstances of the case, even if it is presumed no notice to such an effect was issued, very fact specific plea was raised in the written statement that for failure to make the payment of the balance sale consideration within stipulated period rendered the agreement rescinded and earnest amount forfeited is sufficient notice, such fact coupled with fact that the Plaintiff on one hand failed to offer sale consideration within agreed period, secondly did not tendered the amount despite order of the learned trial Court dated 19.7.2005 and even after the suit was dismissed on 7.10.2003 no effort was made to deposit the balance consideration what to speak of making any offer. The Appellant in cross examination agreed to sell the property at the current market value. The Respondent No.1 not only conceded that consequence for not making payment in time would result in forfeiture of the earnest money. He declined the offer of the appellant to purchase the property at current value. In a recent case<sup>6</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

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<sup>6</sup> Space Telecommunication (Pvt) Ltd. v. Pakistan Telecommunication Authority 2019 SCMR 101

earnest amount paid to the appellant represent merely 5.26% of total sale consideration.

14. At this stage, learned counsel for the appellants on instructions states that out of sheer benevolence appellants are prepared to refund 50% of the earnest amount received by them i.e. Rs.5,00,000/- (five lac) each to the respondent No.1 as a humane consideration. We record our appreciation for the conduct of the appellant, displaying grace toward the Respondent No.1, to which he was not otherwise entitled under the facts and circumstances of the case. We would, therefore modify the impugned judgement to the extent that appellants shall refund Rs.5,00,000/- (five lac) each to the respondent No. 1 through pay order within 45 days from the date of receipt of this order. Appeal allowed, with partial modification as noted herein. In view of the above CMA 4053/2018 also stand disposed of.

Judge

Judge

Judge

Islamabad,  
4<sup>th</sup> May, 2020  
Sarfraz /-  
**'Approved for reporting'**