

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.802 of 2004

Iqbal Ahmed ----- Plaintiff

Versus

Col. Abdul Kabir -----Defendant

**Dates of hearing: 14.10.2016, 23.11.2016, 24.01.2017,
31.01.2017, 09.02.2017 & 28.02.2017.**

Date of Judgment: 29.03.2017.

**Plaintiff: Through Mr. Mushtaq A. Memon,
Advocate.**

Defendant: Through Mr. Jaffar Raza, Advocate.

J U D G M E N T

Muhammad Junaid Ghaffar, J. This is a Suit for Specific Performance, Possession and Permanent Injunction and precisely the facts as stated are that the defendant through its attorney entered into an Agreement of Sale dated 07.10.2003 with the plaintiff for property bearing No.SD House bearing No.40 situated in Complex of Askari Apartments III, School Road behind Kidney Centre/Hockey Club of Pakistan Karachi Cantt. Karachi (**hereinafter "Suit Property"**), for a total sale consideration of Rs.70,00,000/=, out of which Rs.10,00,000/- was paid by Pay Order dated 07.10.2003 and thereafter another amount of Rs.10,00,000/- was paid through cheque dated 15.12.2003. Whereas, it was agreed that balance Rs.50,00,000/- will be paid at the time of handing over of vacant possession of the Suit Property and completion of sale formalities, including registration and execution of Irrevocable Sub-General Power of Attorney in favour of the plaintiff or his nominee on or before 15.01.2004. It is further stated that attorney of the defendant was approached before

15.01.2004 with balance sale consideration and execution of sale deed but was regretted on the pretext that the original documents of the Suit Property are presently not available and she is trying to trace out the same. It is further stated that on 10.02.2004, the defendant's attorney and her husband visited the plaintiff and informed that original papers are still not traced out, which will take some time and accordingly they returned back an amount of Rs.10,00,000/- to the plaintiff. It is further stated that the parties agreed for amendment in the agreement and some insertion was made with handwriting to the effect that the execution date shall be decided at the end of April, 2004. It is further stated that in the first week of April, 2004, once again the defendant was approached for acceptance of the balance sale consideration; however, the plaintiff was informed that again the original documents are not ready, upon which the plaintiff doubted the bonafide of the defendant and felted necessary to issue a cheque for the balance amount of Rs.60,00,000/- on 29.04.2004 in the name of defendant's attorney and made an effort to deliver it but she was not available, therefore, same was handed over to the Estate Agent for its onward delivery. However, the plaintiff was informed that such payment has been refused, thereafter, the plaintiff received Letter dated 09.06.2004 on 12.06.2004 from defendant's attorney through which the plaintiff was informed that he has allegedly failed to pay balance sale consideration and therefore agreement stands cancelled, hence instant Suit.

2. After issuance of summons and notices, the defendant filed written statement and vide Order dated 28.03.2005, the following Issues were settled:-

1. Whether the suit as framed is maintainable?
2. Whether the parties entered into a sale agreement dated 7th October, 2003?
3. Which of the party committed breach of the Agreement and to what effect?
4. Whether the Agreement was rightly cancelled by the defendant through Notice dated 9/6/2004? If so, its effect.

5. Whether the agreement is capable of specific performance?

6. What should the Judgment and Decree be?

3. The evidence was recorded through Commission and the plaintiff and defendant both produced three witnesses each.

4. Learned Counsel for the plaintiff has contended that insofar as agreement in question is concerned the same has not been denied, whereas, the alteration and amendment is also admitted. Per Learned Counsel the defendant was not in a position to execute the Sub-Power of Attorney due to lack of original documents and therefore for such reason even returned Rs.10,00,000/- out of 20,00,000/- paid as advance money. According to him the parties agreed that the date for performance of the agreement be extended from 15.01.2004 and the final date for such purposes would be settled at the end of April, 2004; and therefore since no date was agreed upon, time was not essence of the contract. He has further contended that plaintiff made all efforts to pay the balance sale consideration and even approached defendant with a cheque in its name through the Estate Agent, however, the same was refused, whereas, the balance sale consideration has been deposited with Nazir pursuant to an Order of this Court. Learned Counsel has read out cross-examination of the witnesses of the plaintiff as well as defendant and has contended that the defendant has not been able to discharge their burden vis-à-vis the conclusion of the agreement on a specified date and therefore the plaintiff is entitled for the relief of Specific Performance. According to the learned Counsel, the agreement in question could not have been unilaterally cancelled by the defendant through its Letter dated 09.06.2004 inasmuch as it was incumbent upon the defendant to first ask the plaintiff as a last and final chance to honour the agreement by making payment of the balance sale consideration. Learned Counsel has contended that failure to do so does not entitle the defendant for any relief including any power and authority to cancel the agreement, which could only be done once the plaintiff fails to respond to any such demand of payment of balance sale consideration. Learned Counsel has also contended

that it is a settled law by now that if the parties to an agreement jointly concede to an extension in the date of its performance, then time does not remain essence of the contract, whereas, even otherwise this Suit was filed within a reasonable time of one and half month for seeking Specific Performance though the limitation provided is for three years, and therefore, it shows the bonafides of the plaintiff. Learned Counsel has further contended that the averments in the written statement are contradictory to the evidence led by the defendant, and therefore, cannot be taken into consideration. Per Learned Counsel insofar as the relief being sought by the plaintiff is concerned, there is no serious objection as to maintainability of the Suit, whereas, the agreement in question is also admitted and the defendant has failed to establish and prove that plaintiff committed any breach of the agreement warranting its cancellation, whereas according to him the plaintiff showed its bonafide by depositing the balance sale consideration as per directions of the Court, and is therefore, entitled for the relief of Specific Performance. In support of his contention learned Counsel has relied upon the cases reported as **2016 SCMR 274 (Azeem Khan and another v. Mujahid Khan and others)**, **2010 SCMR 286 (Muhammad Hussain and others v. Dr. Zahoor Alam)**, **2002 SCMR 326 (Mst. Baswar Sultan v. Mst. Adeeba Alvi)**, **PLD 2011 Supreme Court 323 (Naseer Ahmed Siddique through Legal Heirs v. Aftab Alam and another)**, **PLD 2010 Supreme Court 952 (Mst. Mehmooda Begum v. Syed Hassan Sajjad and 2 others)**, **2016 SCMR 1248 (Muhammad Ashiq Khan v. Muhammad Sharif and others)**, **PLD 2011 Karachi 524 (Reza Iqbal v. Royal Group through Attorney)**, **2008 CLC 1340 (Ashfaq Ahmed and 6 others v. Ch. Maqbool Raza and 4 others)**, **PLD 1977 Karachi 480 (Messrs Haji Hasham Haji Ahmed & Bros. v. Messrs Trading Corporation of Pakistan Ltd. Karachi)**, **2004 CLC 478 (Javed Iqbal v. PASSCO and another)**, **2002 YLR 3223 (Lehrasap Khan and 3 others v. Muhammad Sarwar Khan and another)**, **2014 YLR 1986 (Amir Ghaus v. Muhammad Jahangir Iqbal and 2 others)**, **2007 CLC 1746 (Faheem Ahmed v. Ata-ur-Rehman)**, **PLD 1978 Supreme Court 220 (Mst. Amina Begum and others v. Mehar Ghulam Dastgir)**, **PLD 2011 Supreme court 540 (Hafiz Shaikh Anwar-ul-Haque through L.Rs. v. Jehan Khan and others)**, **1997 MLD 880**

(Fazalur Rehman through Legal Heirs and others v. Mst. Batul and others), 2015 SCMR 21 (Muhammad Iqbal v. Mehboob Alam), 2001 CLC 1029 (Shraf Hanif v. Mst. Najma Alavi), 2005 CLC 1251 (Biluram v. Umaruddin through attorney and another), 1994 SCMR 2189 (Mrs. Mussarat Shaukat Ali v. Mrs. Safia Khatoon and others), PLD 1962 Supreme Court 1 (Abdul Hamid v. Abbas Bhai- Abdul Hussain Sodawaterwala).

5. On the other hand, learned Counsel for defendant has submitted that insofar as the agreement in question is concerned, the same is admitted and so also the handwritten endorsement and extension on the agreement is also not denied. He, however, submits that the date of performance is disputed as according to the defendant time was essence of the agreement as the same was to be completed within the extended period i.e. 30.04.2004. Per learned Counsel the amount of 10,00,000/- was not returned voluntarily but at the request of plaintiff, who was in dire need of money and since the parties had agreed for extension in time from 15.01.2004 to 30.04.2004, the defendant as a gesture returned the amount of Rs.10,00,000/-. Per learned Counsel the plaintiff was never in a position to pay the balance sale consideration and to perform the agreement in question, and in support learned Counsel has contended that the plaintiff in its evidence has failed to place on record any material including the Bank Statement so as to justify that he had enough resources on the given date to pay the balance sale consideration. Learned Counsel has read out the evidence of the plaintiff and its witnesses and has contended that they are contradictory to each other, whereas, even the pleadings are not supported by the evidence of the plaintiff. He has further contended that though the balance sale consideration was deposited pursuant to orders of the Court but was done quite belatedly on 13.01.2005 and after the injunction application was dismissed, even an attempt was made to withdraw the balance sale consideration, which speaks of the conduct of the plaintiff insofar as performance of his part of agreement is concerned. Learned Counsel has contended that according to the pleadings of the plaintiff the meeting for the first time was held on 10.02.2004 and by such date the time for performing the agreement already fixed

i.e. 15.01.2004 had expired. Learned Counsel has contended that time was essence of the agreement inasmuch as the plaintiff while filing this Suit has himself annexed a copy of cheque dated 29.04.2004 allegedly handed over to the Estate Agent, which establishes that according to the plaintiff's own interpretation the final date was 30.04.2004 and for such reason this cheque was prepared, which though was never received by the defendant. Per learned Counsel the plaintiff failed to bring in its evidence the Estate Agent to whom the cheque was handed over for onward delivery, and therefore, such assertion has gone unproved. He has further contended that even otherwise it is not conceivable that a party selling its property would be receiving balance sale consideration through cross-cheque, instead of Pay Order and will also execute Power of Attorney, as no seller could take such risk by doing so against a cheque. Learned Counsel has read out the evidence of the plaintiff and has contended that in his cross-examination it has been admitted that at the relevant time he had no funds in his account, therefore, this story of issuing a cheque has been created subsequently by the plaintiff without any basis. Per learned Counsel the plaintiff never acted promptly nor made any effort to perform his part of the agreement, and therefore, agreement was cancelled on 09.06.2004, whereas, pursuant to Order of this Court, the amount of Rs.10,00,000/- received as advance has also been deposited with the Nazir of this Court. According to the learned Counsel though limitation provided in Law is three years, however, in cases of Specific Performance it is the conduct of the parties, which matters consideration, whereas, in this case the plaintiff has made an attempt belatedly to seek Specific Performance of the Agreement and by his conduct has never shown any intention to perform his part of agreement within the stipulated time. He has further contended that it is by now a settled law that relief of Specific Performance is discretionary in nature and even if a case is made out, the same can be refused by the Court after examining the peculiar facts of each case. In support of his contention he has relied upon the cases reported as **2015 SCMR 21 (Muhammad Iqbal v. Mehboob Alam, PLD 2006 Lahore 565 (Munir Ahmed and 7 others v. Bashir Ahmed and 2 others), Saradamani Kandappan v. Rajalakshmi & others (Supreme**

Court of India), 2010 SCMR 286 (*Muhammad Hussain and others v. Dr. Zahoor Alam*, 2007 SCMR 1186 (*Abdul Ghani v. Muhammad Shafi*), PLD 2010 SC 952 (*Mst. Mehmooda Begum v. Syed Hassan Sajjad and 2 others*), 2010 MLD 123 (*Saeed Naseem Cheema v. Mrs. Rukhsana Khan*), 2007 CLC 1814 (*Zahid Rahman v. Muhammad Ali Asghar Rana*), 2007 CLC 1853 (*Haji Muhammad Ali v. Mst. Shahnaz Akhtar and 4 others*), 1989 CLC 1883 (*Syed Muhammad Saleem v. Ashfaq Ahmad Khan and another*), 2005 YLR 1347 (*Mst. Shaheen Kausar v. Shakeel Ahmed*), 1998 SCMR 2485 (*Muhammad Sharif v. Mst. Fajji alias Phaji Begum through Legal Heirs and another*), 2010 CLC 191 (*Bashir Dawood v. Haji Suleman Goawala & Sons Ltd. and others*, 2015 MLD 49 (*Syed Muhammad Waqar ud din v. Owais Ahmed Idress*), 2000 CLC 184 (*Haji Abdur Rehman v. Niaz Ali through Legal Heirs*), PLD 2003 SC 518 (*Bootay Khan through Legal Heirs v. Muhammad Rafiq and others*), PLD 2006 Karachi 593 (*Messrs Imperial Builders through Managing Partner and another v. Lines (Pvt.) Limited through Chief Executive and 3 others*), 2012 SCMR 280 (*State Bank of Pakistan through Governor and another v. Imtiaz Ali Khan and others*).

6. I have heard both the learned Counsel and perused the record including the evidence led by the parties. My Issue-wise findings are as under:-

ISSUE No.1.

7. The learned Counsel for the defendant has conceded that insofar as the maintainability of the Suit is concerned there is no objection; however, it is subject to the condition the plaintiff has not been able to discharge his burden and is not entitled for any relief in the circumstances. Accordingly Issue No.1 is answered in affirmative.

ISSUE No.2.

8. Again it appears to be an admitted position that agreement was entered into by the parties. Accordingly, Issue No.2 is also answered in the affirmative.

ISSUE Nos.3, 4 & 5:

9. Both these Issues are interlinked, and therefore, they are being decided together. The agreement dated 07.10.2003 as well alteration and addition is not in dispute. The plaintiff entered into the purchase of the Suit Property for an amount of Rs.70,00,000/- and accordingly paid a sum of Rs.10,00,000/- through Pay Order No.484913-717 dated 07.10.2003 drawn on American Express Bank Ltd. Shaheen Commercial Complex, Karachi as advance payment. Thereafter admittedly paid another sum of Rs.10,00,000/- through a cross cheque dated 15.12.2003, whereas, as per the terms of the agreement the balance sale consideration of Rs.50,00,000/- was to be paid by or before 15.01.2004. It is the case of the plaintiff that before 15.01.2004 he approached the defendant with the balance sale consideration of Rs.50,00,000/- but the defendant showed her inability to execute the Sub Power of Attorney on the pretext that the original documents of the Suit Property are not traceable. The plaintiff's further case is that subsequently on 10.02.2004 a meeting was held between the parties, wherein, the defendant once again informed that the documents are still not available and therefore also returned an amount of Rs.10,00,000/- out of the advance payment. Plaintiff's further case is that on such date there was some alteration and addition in the original agreement, whereby, return of Rs.10,00,000/- was endorsed and so also an alteration in the date of execution of the Sub Power of Attorney from 15.01.2004 to the extent it shall be decided at the end of April, 2004. On the other hand, the defendants' case is that plaintiff did not had enough funds available with him, and therefore, failed to make payment of the balance sale consideration by 15.01.2004 and approached the defendant for refund of an amount of Rs.10,00,000/- so as to meet his urgent needs. The defendant's further case is that alleged non-availability of the original documents is a concocted story of the plaintiff as it has never been a factual position. Further, according to the defendant, the plaintiff never approached for payment of the balance sale consideration and after his failure on 09.06.2004, the defendant cancelled the

agreement in question and voluntarily offered to return the balance of Rs.10,00,000/- from the advance payment. According to the defendant the agreement stood cancelled, and thereafter instant Suit has been filed to drag the defendant. To arrive at just and fair conclusion, it would be advantageous to refer to the relevant portion of the agreement in question before and after the alteration and amendment agreed upon by the parties:-

“2. That out of balance payment of Rs. 60,00,000/- (Rupees sixty thousand only) a further sum of Rs. 10,00,000/- (Rupees Ten Lac only) will be paid by the Vendee to the Vendor on or before 15-12-2003.

3. That balance and remaining payment of Rs. 50,00,000/- (Rupees Fifty Lac 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 / execution of Irrevocable Sub-General Power of Attorney in favour of the Vendee or his nominee(s) on or before 15.1.2004. If the lease of SD Houses are open during the period in such event it will be completed / processed by the Vendor.”

After alteration and amendment, the above mentioned paras read as under:-

“2. That out of balance payment of Rs. 60,00,000/- (Rupees sixty thousand only) a further sum of Rs. 10,00,000/- (Rupees Ten Lac only) will be paid by the Vendee to the Vendor on or before 15-12-2003. This amount of Rs.10,00,000/- being (10 lacs only) refunded vide Cheq No.2556075 dated 10.02.2004 of HBL Cantt Branch Karachi.

3. That balance and remaining payment of Rs. 50,00,000/- (Rupees Fifty Lac 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 / execution of Irrevocable Sub-General Power of Attorney in favour of the Vendee or his nominee(s) The execution date shall be decided at the end of April, 2004.”

10. Perusal of the aforesaid agreement in the original text as well as after its amendment reflects that Rs.10,00,000/- were refunded to the plaintiff and same stands admitted. Insofar as the Second part of the amendment of the agreement in question is concerned this appears to be a crucial point in this matter. The plaintiff's case as setup in the plaint and in the evidence, (rather more in the evidence as well as in the arguments) is that time was never essence of the agreement. According to the learned Counsel for the plaintiff the words are clearly written “*that the execution date will be decided at the end of April, 2004*”, therefore, per learned Counsel since time was never essence of the agreement and it was to be decided, which never

happened, hence the plaintiff is entitled for Specific Performance of the Agreement notwithstanding the shortcomings, if any. Though apparently, on a plain reading of this insertion/addition, it appears that no final date was mentioned therein but was to be decided at the end of April, 2004. However, in my view and notwithstanding the text so written in the agreement, it is the conduct of the parties, which would ultimately determine that time, was essence of the agreement or not. Though the learned Counsel for the plaintiff has vehemently argued that by plain reading of the amended agreement, time was not the essence of contract, however, perusal of the pleadings specially the plaint, it reflects that the plaintiff's case is otherwise. Para-8, of the plaint reads as under;

"8. That, in the first week of April 2004, the Plaintiff approached the attorney of the defendant and requested her to accept the total balance amount of the sale consideration and execute the registered sale deed in his favour but she went on giving hollow hopes sometimes that the original documents were still not traceable or that the duplicate/true copies were not received from the concerned agencies. This time the plaintiff doubted the bonafides of the defendant party and, therefore, felt it necessary to issue a cheque for the balance amount of Rs.60,00,000/- (Sixty Lac) on 29.04.2004 in the name of Mrs. Qamar Kamal Khan, attorney of the defendant, drawn on Muslim Commercial Bank Limited, Hotel Metropole, Merewether Road Karachi, and wanted to deliver the said cheque to the attorney of the defendant but all the time she was not available at her residence. Resultantly the plaintiff delivered the said to the Estate Agent, namely, Hameed Akbar Lodhi for delivering the same to Mrs. Qamar Kamal Khan, attorney of the defendant. It is pertinent to submit that the said Mr. Hameed Akbar Lodhi, who is the Estate Agent, was the person who was instrumental in getting both the parties in entering into the sale agreement. On enquiry, the said Estate Agent has informed the plaintiff that the attorney of the Defendant has refused to accept the cheque for the reasons best known to her. Photostat copy of the Cheque is filed as Annexure "C"."

In para-8 of the Plaint, the plaintiff states that in the first week of April, 2004, he approached the defendant to accept the total balance amount of the sale consideration and execute the registered Sale Deed (should have been Sub-Power of Attorney), and after having received no positive response, the plaintiff doubted the bonafides of the defendant, and therefore, felt it necessary to issue a cheque for a balance amount of Rs.60,00,000/- on 29.04.2004

and made an attempt to deliver the said cheque to the defendant and upon refusal handed over it to the Estate Agent for delivering the same to the defendant. Now what the learned Counsel has argued on behalf of the plaintiff is in total contradiction to the pleadings, as according to the learned Counsel the cheque in question was undated, and therefore, the plaintiff never presumed that time was the essence of the agreement. Though the learned Counsel has made all possible efforts to argue that plaintiff never wrote any date on this cheque and even to the extent that the mentioned date is in a different handwriting. However, the learned Counsel has lost sight of the fact that this cheque was annexed with the plaint by the plaintiff. If according to the plaintiff, this cheque was undated then how come he is in possession of a cheque on which date is mentioned as 29.04.2004. In reality then he should have been in possession of an undated cheque which was returned to him, and if his case is that it was mentioned by the Estate Agent, then notwithstanding the fact that no such plea has been raised, the said Estate Agent has not come in the witness box to support such plea. It is an admitted position that this cheque was never handed over to the defendant nor it was deposited in the defendant's account. If the same was given to the Estate Agent for onwards delivery to the defendant, then it must have been returned back in original by the Estate Agent to the plaintiff, and therefore this argument fails that this date was mentioned by someone else and not the plaintiff. This amply leads to the fact that according to the plaintiff himself, time was essence of the agreement inasmuch as he made all his possible efforts starting from the first week of April, 2004 to pay the balance sale consideration to the defendant on or before 30.04.2004. This is what the plaintiff has pleaded in his plaint and thereafter has made an attempt to alter his stance in the evidence.

Nonetheless, even otherwise, the plaintiffs conduct does not reflect that he was ever in a position to perform his part of the agreement at any time until finally he deposited the balance sale consideration on the directives of this Court. And this is very crucial to this case as the plaintiff pleads that time was never the essence of the agreement, whereas, he was always ready and willing to perform his part of the agreement. To a question

regarding his ability to perform his part of the agreement, he says that ***“it is correct to suggest that at the time of issuing cheque of Rs. 60,00,000/- there was no credited amount in my Bank Account. Voluntarily says I could arrange sooner the date is settled as I was standby with the bank for arranging the said amounts. It is correct that uptill 29.4.2004 I had not arranged Rs. 60,00,000/- in my Bank Accounts because the execution of the deal was not finalized”***. Now this clearly reflects as an admission on the part of the plaintiff that though he had issued a cheque (which according to him was undated, nonetheless, arrangement of funds is must), there was no corresponding arrangement of funds in his account as no date was settled. However, contrary to this to another question he has replied that ***“at the time of purchase of the Suit house I do have the required funds of Rs. 70,00,000/- (Seventy Lacs Only)***. Moreover, the plaintiffs witness (PW-2, Noor Muhammad Kalwar) in his cross examination says that ***“I do not exactly remember as to on what date the said cheque was taken to the defendant by my brother. The cheque is dated 29.04.2004. I have personally seen the cheque of Rs. 60 lacs.”*** This leads to no other conclusion, but that the cheque was not undated as contended by the learned Counsel for the plaintiff as the witness says that he has personally seen the cheque and it was dated 29.04.2004.

11. Insofar as the contention of the plaintiff that defendant was never in possession of any title documents and since the Sub-Power of Attorney was not executed, therefore, payment was not made is concerned again the same is not substantiated by any affirmative or positive evidence. The plaintiff has miserably failed to lead any evidence to that effect, whereas, no particular question has been asked from the defendant in the cross-examination regarding the same. The agreement in question very clearly reflects ***“whereas the Vendor above named at the time of these presents seized, possessed of and well and sufficiently entitled to all that SD House bearing No.40, situated in Complex of Askari Apartments-III, School Road, (Behind Kidney Centre/Hockey Club of Pakistan), Karachi, Cantt., hereby referred to as the “said property”, leading to the conclusion that when agreement was signed by the plaintiff, all such documents of ownership were examined and there was no shortfall at that point of time as alleged later. Nothing has come in evidence so as to suggest the contrary, and leads to draw a positive***

inference that at the time of the agreement all documents were in order. This belies the contention that agreement could not materialize for the reason that documents were not ready with defendant, whereas plaintiff was ready to perform his part of the agreement.

It is also pertinent to observe that the plaintiff has also failed to substantiate his willingness to perform the agreement to the extent that no document or any other material including purchase of stamp duty etc. has been placed on record through evidence so as to suggest that he had prepared the transfer documents including the sub-power of attorney in his or any of his nominees name as mandated in Para 11 of the Agreement. This shortcoming in the plaintiffs' evidence is crucial and goes to the root of the argument of the defendants Counsel that the plaintiff was never willing to or was ready to perform the agreement.

The plaintiff has also failed to bring in evidence the Estate Agent, though he was mentioned in the list of witnesses and perhaps his affidavit-in-evidence was also filed but he was not summoned for any cross-examination. This leads to an adverse inference against the plaintiff insofar as the contention that Estate Agent was handed over cheque and so also that the same was refused by the defendant. It is also difficult to conceive that if the plaintiff's case is that defendant had no original documents in her possession then why a cheque of Rs.60,00,000/- was issued and an attempt was made to deliver the same before 30.04.2004, in absence of and without perusal and examination fo the said documents. Moreover, in Agreements of immovable properties, it is always a routine and practice that balance sale consideration is to be paid at the time of registration of the documents, be it a Power of Attorney or a Sale Deed and not before that. If the defendant was not in possession of the original documents as alleged, then why an attempt was made to pay her before the date of execution. If the contention of the plaintiff is that there were no documents available with the defendant, then the plaintiff ought to have come to the Court before the agreement was cancelled by the defendant. Nothing prevented the plaintiff from seeking enforcement of his rights and to have knocked the doors of the Court. It is also very strange to note that the cancellation letter was admittedly received

by the plaintiff on 12.06.2004 but was never responded. In his cross-examination, the plaintiff has admitted to that effect that no reply was given and subsequently after passing of almost 40 days, instant Suit was filed. These are the circumstances through which an inference can be drawn that plaintiff was never in possession to perform his part of the agreement and it is only after filing of the Suit and passing of certain directions that balance sale consideration was deposited in the Court. Subsequently, the plaintiff even filed an application (CMA No. 3652/2006) to withdraw the same, however, by consent Nazir was directed to invest the same in some Government profit bearing scheme. This conduct of the plaintiff shows that even otherwise after making deposit with the Court, the plaintiff wanted to withdraw the same, and therefore it cannot be said that he was willing to perform his part of the agreement at all times to come.

12. The entire case as set up by the Plaintiffs' Counsel is premised on the assertion that time was never the essence of the agreement. It may be observed that in contracts of immoveable properties whether time is essence of the agreement or not the intention of the parties in terms of Section 55 of the Contract Act is to be assessed. The General Rule that time is to be presumed to be essence in transactions of sale and purchase of goods and that it is usually not of essence in similar transactions touching immoveable properties, as recognized by their Lordships in *Abdullah Khan v. Muhammad Khan*, PLD 1965 SC 690, can appropriately give way to a contrary intendment in the contemplation of the parties to a contract. Such intention is to be gathered from the terms of the contract itself, as translated by the conduct of the parties and the attending circumstances. The terms themselves are to be construed with reference to the spirit and substance rather than the bare words or recitals in a deed.¹ As discussed hereinabove the plaintiff in its evidence has failed to substantiate that he was willing to perform his part of the agreement and was in fact in a position to honor the agreement by making arrangement of the balance sale consideration. The Trial Court on elaborate, careful and correct appraisal of evidence rightly came to the conclusion that it was the plaintiffs who failed to perform their part of the contract, for they did not have at the relevant time sufficient money to pay the remaining sale price, therefore, merely because a substantial amount of the sale price had already been paid as earnest money was not sufficient ground to decree

¹ *Muhammad Sharif v Fajji* (1998 SCMR 2485)

the suit of the plaintiffs.² It may be so but it did not absolve the respondents-plaintiffs from their legal obligation to prove that they were ready and willing to perform their part of the contract at relevant time. Their oral evidence was not coupled with any substantive steps to prove their intention to perform their part of the agreement coupled with the finding that they did not have sufficient money to pay the sale price.³

The plaintiff in his cross examination at one place states that *“it is correct that time was extended by the defendant for finalization of the deal. It is correct to suggest that there is no mention in the agreement for the extension of time on account of misplacement of the original title documents. **The extended time expired in the end of April 2004**”*. He further states that *“The cheque was undated because of the final deal pending. **I have not mentioned the particulars of the cheque of Rs. 60,00,000/- in my plaint and Affidavit in Evidence. I have annexed as “C” with my Affidavit in Evidence. I do not remember whether I have annexed the copy of the said cheque with my plaint**”*. This again does not support the contention that the cheque was undated when it was given to the Estate Agent, whereas, if it was so, then at least such fact should have been disclosed in the plaint and the Affidavit in Evidence, which is not the case.

13. It is by now a settled proposition that relief of Specific Performance is discretionary in nature. It is not that in every case of Specific Performance the Court is bound to grant the Specific Performance of the agreement. It is the peculiar facts and circumstances as well as **conduct of the parties**, which is to be kept in mind. The relevant provision dealing with Specific Performance under Specific Relief Act, 1877, are Sections 22 and 24, which reads as under:-

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.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance:----

- I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair

² Bootay khan v Muhammad Rafiq (PLD 2003 SC 518)

³ Bootay khan v Muhammad Rafiq (PLD 2003 SC 518)

advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.

- II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.
- III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

24. Personal bars to the relief. Specific performance of a contract cannot be enforced in favour of a person---

- (a) Who could not recover compensation for its breach;
- (b) Who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed;
- (c) Who has already chosen his remedy and obtained satisfaction for the alleged breach of contract; or
- (d) Who, previously to the contract, had notice that a settlement of the subject-matter thereof (though not found on any valuable consideration) had been made and was then in force."

14. Section 22 provides that the jurisdiction of the Court to decree specific performance is discretionary in nature, and the Court is not bound to grant such relief merely because it is lawful to do so, however, 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. However, in this very Section there are situations, which provide that the Court may not exercise discretion to decree specific performance. Sub-Para (I) provides a situation where the circumstances under which the contract is made, gives the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part. Similarly, Sub-Para (II) provides a situation where the contract would involve some hardship on the defendant, which he did not foresee, whereas, its non-performance would involve no such hardship on the plaintiff and Sub-Para (III) provides, where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance. The Hon'ble Supreme Court in the case of **Liaqat Ali Khan and others v.**

Falak Sher and others (PLD 2014 Supreme Court 506) has eloquently examined this provision and has observed as under:-

“18. A plain reading of above reproduced statutory provision leads to a definite conclusion that the relief of specific performance claimed by respondents Nos.1 to 4 in their suit is, purely discretionary in nature and the Court is not bound to grant such relief merely as it is lawful to do so. At the same time, the discretion to be exercised by the Court shall not be arbitrary, but it should be based on sound and reasonable analysis of the relevant facts of each case, guided by judicial principles and capable of correction by a Court of appeal. Moreover, in sub-paragraphs Nos. i, ii and iii of section 22 (ibid) some instances have been given, where the Court can refuse to exercise its discretion to pass a decree for specific performance. A careful reading of these instances, which are self-explanatory, further amplify vast powers of the Court in the matter of exercise of its discretion for ordering specific performance or otherwise. When the above reproduced provision of law is read in conjunction with the case-law cited at the Bar by both the learned Senior Advocate Supreme Courts, the things as regards powers of the Court in exercising its discretion, become even more clear that there is no two plus two, equal to four formula available with any Court of law for this purpose, which can be applied through cut and paste device to all cases of such nature. Conversely, it will be the peculiar facts and circumstances of each case, particularly, the terms of the agreement between the parties, its language, their subsequent conduct and other surrounding circumstances, which will enable the Court to decide whether the discretion in terms of section 22 (ibid) ought to be exercised in favour of specific performance or not. Besides, some well articulated judgments on the subject, have further broadened the scope of exercise of such discretion of the Court by way of awarding reasonable compensation to the parties, keeping in view the other surrounding circumstances, such as rate of inflation, having direct bearing the value of suit property, inordinate delay/ passage of time, and change in the circumstances or status of the subject property etc. To further amplify the aspect of exercise of discretion, here a reference may also be made to the language of section 19 of the Specific Relief Act 1877, which reads thus:--

19. Power to award compensation in certain cases.--Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

Explanation.---The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section."

15. Similarly in terms of Section 24(b), Specific Performance of a contract cannot be enforced in favour of a person, who has either become incapable of performing or violates, any essential term of the contract that on his part remains to be performed. This again has been examined by the Hon'ble Supreme Court in the aforesaid judgment. The relevant findings are as under:-

"24. When we go into further details of the case from another angle, we find that initial burden to prove that after the execution of agreement dated 2-4-1979, at all times the respondents Nos.1 to 4 were willing to perform their part of the agreement or that time was not the essence of the agreement, though specifically agreed to, was on them but all the three witnesses examined by them as P.W.1 to P.W.3, who were either their relatives or otherwise interested, remained totally silent and did not state much about their conduct in this regard. As against it, the conduct of the appellants is quite clear from their written notice dated 13-5-1979, addressed to the respondents Nos.1 to 4, sent just three days after the expiry of the time agreed under the agreement, and thereafter filing of application in terms of section 4 of the Punjab Relief of Indebtedness Ordinance, 1960. Not only this, but even thereafter throughout they remained consistent in their stance, firstly, that time agreed for performance was essence of the agreement, which stood frustrated due to non-payment of balance sale consideration within the stipulated period, irrespective of the pendency of the two earlier suits as the said suits were instituted before the execution of agreement between the parties and secondly/alternatively, due to clear stipulation in the agreement that if any legal impediment comes in the way of specific performance of the agreement in its agreed terms then it shall be deemed to have been cancelled.

25. Keeping in view the facts and circumstances of the present case, as discussed above, we have also carefully gone through the judgments cited by both the learned Advocates Supreme Court in support of their respective contentions, particularly, as regards the question as to whether in a suit for specific performance of contract in respect of some immovable property time is not the essence of the contract and what are the fundamental principles regulating the exercise of discretion by the Court in granting the requisite relief within the legal frame of section 22 read with sections 23 and 24 of the Specific Relief Act. The pith and substance of the cases cited above is that primarily it would entirely depend upon the specific terms/language of the agreement and the relevant facts and circumstances of each case at the time of entering into the agreement and thereafter, which will enable the Court to decide whether the stipulation of specific time for performance of an agreement was not the essence of the contract or the Court while exercising its discretion in this regard could brush aside such agreed stipulation of timeframe merely for the reason that the agreement relates to a transaction involving sale of immovable property. Moreover, as regards the scope of section 22 (ibid) the Court has vast discretion to exercise in favour of specific performance or its refusal,

but such discretion is to be exercised on sound judicial principles and not in an arbitrary manner or for the reason that it is permitted by law to do so. Keeping these legal principles in mind, at the cost of repetition, when we again revert to the facts of the present case, we find that the agreement dated 2-4-1979 between the parties was entered into at a time when two civil suits, challenging/disputing the title of the vendors, were already pending before the civil Court. Prima facie, it was for this reason that in the written agreement specific stipulation of timeframe was agreed to between the parties for the payment of balance sale consideration with consequential penalty clause of forfeiture of earnest money qua violation of agreement in favour of vendors or filing a suit for specific performance in the other situation, which is by itself sufficient to show clear intention of the parties that time was the essence of the agreement. In addition to it, another stipulation as regards cancellation of the agreement was also mutually agreed between the parties on account of any legal impediment or difficulty due to which the parties were unable to complete the transaction as per stipulation in the agreement. In this regard interpretation of word " " (legal defect/impediment) cannot be confined or limited to defect in the title of the suit land alone, but any other unforeseen legal eventuality, which may impede or obstruct the performance of the agreement as per its agreed terms. The timeframe up to 10-5-1979 for payment of balance sale consideration and relating to registration of sale deed from the vendors has also been conceded by P.W.4 Noor Muhammad in his deposition, which has been misread by the appellate Court in its impugned judgment due to interpolation in the record. Had it been a case where the word " " was available in between the words " " and " " from the beginning, no such reference would have been available in the judgment of the trial Court in so much clear terms. This conclusion further finds support from the perusal of the original deposition of P.W.4 Noor Muhammad, as discussed in the earlier part of the judgment. In our opinion, in such circumstances when there was clear stipulation of the type incorporated by the parties in the agreement having regards to it, while exercising discretion such agreed terms cannot be disregarded by the Court.”

16. In view of the aforesaid provisions, I am of the view that on a careful consideration of the facts and circumstances of this case as well as the conduct of the parties through the agreement as well as the subsequent acts, it has been established that time was essence of the agreement, and it was the plaintiff, who had failed to perform his part of the agreement and had committed the breach. The entire evidence led by the plaintiff is not supportive to the effect that there was any deficiency in the defendant's documents as alleged. Moreover, the plaintiff and the two witnesses produced by him gave contradictory answers to various questions put to them, details of which are not necessary for the present purposes, but clearly establishes that the evidence led by the plaintiff is not confidence inspiring, on which any reliance can be placed. The plaintiff has failed to prove in his evidence that he was ever capable to pay the balance sale consideration. Mere issuance of cheque

does not satisfy this query. The plaintiff was put a specific question as to availability of funds and the Bank Statement, to which he replied that though he does not possess any money right now but can arrange the same and further undertook to arrange the Bank Statement in support thereof, however, he has failed to do so. This leads to a definite conclusion that the plaintiff has failed to substantiate his case with any reliable evidence. Accordingly, Issue No.3 is answered by holding that the plaintiff was in breach of the agreement, whereas, Issue No.4 is answered in the affirmative, and consequently, the agreement stands cancelled. In view of this Issue No.5 is answered in negative.

Issue No.6

17. In view of the above Plaintiff's Suit is dismissed. The Plaintiff shall be entitled for release of the amount of Rs. 70,00,000/- lying with the Nazir of this Court along with up to date profit.

18. Suit is dismissed. Decree to follow.

Dated: 29.03.2017

JUDGE

Ayaz