IN THE HIGH COURT OF SINDH, KARACHI

H.C.A No. 249 of 2017

PRESENT:

Mr. Justice Syed Hasan Azhar Rizvi
Mr. Justice Khadim Hussain Tunio- JJ

Appellant:	Iqbal Ahmed son of Sahib Dino Kalwar through M/s. Mushtaq A. Memon & Qazi Shunail Ahmed, Advocates.
Respondent:	Col. [R] Abdul Kabir through Mr. Murtaza Wahab Siddiqui, advocate.
Date of Hearing:	**14.05.2018**
Date of Decision:	**04.08.2018**

J U D G M E N T

KHADIM HUSSAIN TUNIO, J-This High Court appeal is directed against the judgment dated 29-03-2017, in Suit No. 802 of 2004, passed by learned Single Judge, filed by the appellant.Consequently, the suit for specific performance of contract, possession and permanent injunction was dismissed.

2. Tersely stated, facts of the present appeal are that the appellant, on 22nd July, 2004, filed a suit, seeking specific performance of agreement of sale dated 7th October, 2003 executed between appellant& the respondent/defendant in respect of Property No. SD-40, Askari Apartment III, School Road, behind Kidney Centre, Karachi Cantt. A total amount of Rs.7.00 million was settled to be paid, out of whichRs.1.00million was paid through pay-order of even date; further payment of Rs.1.00millionwas agreed to be made on or before 15th December 2003, whereas the remaining payment had to be paid on or before 15th January 2004. After the initial payment, the further payment

was performed on time, however the rest of the Rs.5.00million could not be paid by 15th of January, 2004 in terms of agreement. The parties allegedly met in the month of February, 2004 and the attorney for the respondent refunded an amount of Rs.1.00million and drew a cheque dated 10th February, 2004. The contract was modified and the new date was set to be decided in the end of April 2004. It is further averred in the plaint that the deletion of final date of completion of contract and refund of Rs.1.00million were agreed by the parties for the reason that the respondent/defendant had expressed non-availability of title documents. Thereafter, on the later dates, the appellant was ready and willing to fulfil the deal, the respondent was unable to reciprocate on account of non-availability of title documents. The appellantkept on contacting the respondent for the payment, the same did not materialise on account of failure of parties to decide the date of completion of the contract during end of April 2004 but the efforts went in vain. On account of failure, the appellant drew up a cheque in the respondent's attorney's name in the sum of Rs.6.00 millionand upon failing to contact her, handed over the same to the common estate agent who returned the same later on, as the same had been refused by the respondent's attorney. Thereafter, appellant received a notice from the attorney of respondent alleging therein that the agreement was not fully performed on account of appellant's inability to make payment of final instalment of Rs.5.00million with the result that the terms of agreement were changed; and the sum of Rs.1.00million was returned on 10th February 2004 in order to help the appellant out of his alleged financial difficulties with the understanding that the same would be paid within a month whereas the balance amount of Rs.5.00 million would not be paid later than April 2004. With such allegations, it was further mentioned that the appellant had not paid back the sum of Rs.1.00 million, temporarily returned to him as a good gesture on 10th February, 2004 nor had intimated the ability to fulfil the commitment in terms of sale agreement dated 07.10.2003. On the basis of such allegations, the respondent had intimidated the cancellation of agreement and notwithstanding his alleged right to forfeit the advance amount of

Rs.1.00 million paid on 07.10.2003 had notified his willingness to return the same on account of purported cancellation of agreement, therefore suit for specific performance of contract was filed by the appellant against the respondent on 22.07.2004.

3. The respondent filed his written statement admitting therein that the execution of sale agreement dated 07.10.2003 and also while admitting the payment of first two instalments of Rs. 1.00million each, had averred that on 10.02.2004 the appellant had approached him and requested for an extension of time, pleading deep financial crisis and sought refund of Rs.1.00million to overcome the same. It was also pleaded that the agreement dated 07.10.2003 was modified and the date was agreed to be extended upto end of April 2004. It was also admitted that the modification and variation in the agreement was made by the husband of the respondent's attorney *"for and on behalf of the parties".* According to the written statement the payment had to be made after the execution of sub-general-power-of-attorney and against delivery of possession. It was further averred in the written statement that the assertion about cheque dated 29.04.2004 in the sum of Rs. 1.00million, having been offered to the respondent's attorney through the estate agent or its refusal, was completely false and baseless. According to the written statement, the sale agreement dated 07 October 2004 was, therefore, cancelled through letter dated 9th June 2004 and on account of commission of breach committed by the appellant, who has no cause of action to bring the proceedings. The prayer made by the appellant was denied with the assertion that the respondent could only execute sub-general-power-of-attorney with possession against payment of Rs. 6.00million and the sale agreement stood cancelled on 9th June 2004.

4. The pleadings of the parties gave rise to the following issues:-

1. Whether the suit as framed is maintainable?

2. *Whether the parties entered into a sale agreement dated 07th 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 09.06.2004? If so, it's effect?*
5. *Whether the agreement is capable of specific performance?*
6. *What should the judgment and decree be?*

5. Following the framing of the above-mentioned issues, the appellant/plaintiff examined himself and produced affidavit-in-evidence of Mr. Iqbal Ahmed, photostat copy of cheque No. 2556075 dated 10.02.2003 for Rs.1,000,000/- and agreement sale dated 07.10.2003. He also produced the receipt for Rs.1,000,000/- , cheque No. 0000074454 dated 29.04.2004 for Rs.6,000,000/- and legal notice dated 09.06.2004. He further produced affidavit of witness P.W/2 Noor Muhammad Sahto, affidavit in evidence of Noor Muhammad Kalwar. They were cross-examined.The appellant had also filed affidavit-in-evidence of estate agent Akbar Hameed. The estate agent did not step into the witness box, therefore he was given up by the appellant. Respondent/defendant examined his attorney Mrs. Qamar Kamal Khan. She produced legal notice dated 09.06.2004, affidavit in evidence of D.W/2 Mrs. Qamar Kamal Khan alongwith photostat copy of legal notice dated 09.03.2004, affidavit of Salman Ahmed D.W/3. They were cross-examined. The respondent also filed affidavit-in-evidence of one Aziz Aslam, who did not enter into the witness box, therefore he was given up.

6. The learned Single Judge through the impugned judgment and decree, mainly by giving findings on issue No. 3 to 5 in favour of respondent and against the appellant, dismissed the suit. However issue No. 1 and 2 have been found in favour of the appellant.

7. In support of this appeal, the learned counsel for the appellant submits that the sole document possessed by the respondent was general power of attorney allegedly executed in his favour and registered at Taxilla; that the registration of document relating to immovable property with sub-registrar within whose sub-district the concerned property is situated; that it is a settled principle of law that a seller cannot urge time as of essence until completion of his own obligations. Learned counsel referred to **2007 CLC 1746** and **2014 YLR 1927**. He has further argued that the execution date was never decided in terms of the above quoted clause; that no case can be founded on a plea which is never urged, he has referred to caselaw reported as **PLD 1963 SC 553, 1996 SCMR 336, 2013 MLD 1106, 2014 YLR 1689 and 2015 SCMR 1698.** Learned counsel has further urged that in the present matter, the agreement does not provide for time having been agreed as of essence nor it contains any clause for consequences of failure to perform by terminus date (if any), nor is any penalty or forfeiture of advance sale consideration mentioned in the agreement, nor default of any obligation is to be visited with the penalty of cancellation of contract, in such terms he has referred to caselaw reported as **PLD 1993 Karachi 780, 1994 SCMR 2189, 1999 CLC 207, 2007 CLC 1746, 2009 SCMR 114 and 2014 CLC 499.** Learned counsel has further contended that in the absence of any plea on behalf of the respondent to the effect that time was agreed as essence of contract, the same could not have been assumed by the learned Single Judge, more so, to be visited with penalty of cancellation of contract. In this regard, he has referred to caselaw reported as **PLD 1962 SC 1 and PLD 2010 Karachi 295.** He has further argued that the terms of document cannot be varied or modified orally; that the said agreement to sell dated 07.10.2003 does not postulate cancellation and/or consequences for non-performance of obligation(s) by either party; that it is settled principle of law that breach of contract pertaining to immovable property cannot be compensated in terms of money and therefore, time is not assumed as essence of contract; that even if parties agree to a contract upon the term about time, being essence of the contract, the courts do not accept

such a position; that filing of suit for specific performance was in forty two days from the receipt of notice of purported cancellation does not suffer from material delay or latches; that it is axiomatic that where the statute of limitation prescribes specific period for filing suit, the plea of delay or latches, short of limitation, cannot be sustained. In this respect, he has referred caselaw reported as **PLD 1961 Karachi 599, 1970 SCMR 816, PLD 1977 Karachi 391, PLD 1983 SC 344, 1983 CLC 1085** and **1998 CLC 265**. Learned counsel has further argued that original documents of title or even copies were never produced or shown to the court by the respondent at any stage; that the appellant, at all times, continued to be ready and willing to fulfil his part of obligation; that it was on the respondent to demand payment of balance sale consideration stating their readiness to execute transfer deed; that when the seller fails to convey availability of documents, question of inability of the appellant to pay the balance sale consideration cannot be agitated; that even prompt and immediate filing of suit is sufficient to establish readiness and willingness to perform their obligation; that no extensions of time were sought by the appellant for deposit of balance sale consideration; that in the modified form of sale agreement dated 07.10.2003, it does not contain any specific stipulation of time frame nor does provide for any consequential penalty of forfeiture of earnest money or termination of agreement; that the respondent had not sought cancellation of agreement dated 07.10.2003 but had pleaded that it stood already cancelled by unilateral notice dated 09.06.2004.

8. Conversely, the learned counsel for the respondent has supported the impugned judgment. It is emphasized by him that appellant has miserably failed to make out a case for specific performance of the agreement; that inherent contradictions and story coined by the appellant and his witnesses is not coherent and irrational; that the appellant has admitted that he did not have the funds in his account; that he has not shown any evidence that he took efforts to arrange money from the back; that the appellant had no consideration available to him to perform his part of the obligation; that the appellant had not

prepared the transfer documents; that the appellant has admitted that there is no mention of the reason for extension in the agreement hence the story coined by the appellant about missing documents is false and fabricated; that the appellant has also admitted that the extended time expired in the end of April 2004, hence time was of the essence; that the appellant stated that the cheque was undated whereas the evidence shows that the cheque was dated 29.04.2004; that in transactions of immovable property, it is inconceivable that the final payment is made through a cheque prior to the execution of sale document; that the appellant allegedly handed the cheque over to the estate agent Hamid Akbar Lodhi, and despite his name being mentioned in the witness list, he was never examined by the appellant; that if the appellant was eager to finalize the transaction it is unimaginable that he did not reply to the notice of the respondent for cancellation and neither did he approach the court for a period of 42 days; that if he was to have the funds available and was willing to execute the transaction, he would have acted with promptitude. Learned counsel for the respondent has relied upon the caselaw reported as ***2015 SCMR 21, PLD 2006 Lahore 565, Saradamani Kandappan v/s Rajalakshmi & Ors, 2010 SCMR 286, 2007 SCMR 1186, PLD 2010 SC 952, 2010 MLD 123, 2007 CLC 1814, 2007 CLC 1853, 1989 CLC 1883, 2005 YLR 1347 & 1998 SCMR 2485.***

9. We have heard the learned counsel for the appellant and learned counsel for the respondents. Record perused.

10. Be that as it may, the agreement to sell has not been denied by the respondent, and it is also admitted by him that he received an amount of Rs.1,000,000/- as advance amount and another 1 million as the first installment, the sole question falling for consideration is whether time was the essence of the agreement and if so, whether the appellant was at fault and he failed to carry out his part of the bargain. From a perusal of the copy of the agreement to sell, it is hard to sustain the argument that time was the essence of the agreement. Nowhere has it been provided in that in the event of the failure of the

final date, the agreement would be cancelled. Furthermore, as for the inference drawn by the learned Single Judge that the appellant did not possess the requisite fund as admitted by him in his evidence, the same is without any substance as the cheque was never accepted, initially. The sole fact that the appellant, in the same breath, had stated that he would have arranged the entire sum of Rs. 6.00 million in the bank account, had the respondent accepted the cheque has not been appreciated. In order to discharge the burden in positive terms or to rebut the above factual aspect, it was for the respondents to have accepted the cheque, had they received the cheque and presented it for clearance to find that the same was dishonoured, the tides would have been in their favour. However, in the present scenario, it is not even pleaded by the respondent that the appellant did not have the money to pay balance amount of sale consideration.

11. It would be observed that the controversy between the parties centers around the interpretation of section 55 of the Contract Act, 1872 as well as Article 113 of the First Schedule to the Limitation Act, 1908, the same are reproduced hereunder for the ease of reference:-

> "55.Effect of failure to perform at fixed time, a contract in which time is essential.---When a party to a contract promises to a certain thing at or before a specified time, or certain things at or before specified time, and fails to do any such thing at or before the specified time, the contract, or so much of its 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.
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> 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."
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> **Article 113 of the First Schedule to the Limitation Act, 1908**

Description of Suit	*Period of Limitation*	*Time from which period beings to run*
For specific performance of a contract	Three years	The date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused.

12. It is pertinent to mention here that there are several judgments of the Hon'ble Apex Court in which the question at issue cropped up and was dealt with. It would be worthwhile to make reference to a few of the judgments here. It was considered by the Apex Court in the case reported as "Abdul Hamid v. Abbas Bhai-Abdul Hussain Sodawaterwala" **(PLD 1962 SC 1)** and answered as follows:

> "In Jamshed Khodaram Irani v. Burjorji Dhunjibhal (43 IA 26), the Judicial Committee of the Privy Council had occasion to observe that "section 55 of the Indian Contract Act, 1872, does not lay down any principle which differs from the law of England as to contracts for the sale of land. Specific performance of a contract of that nature will be granted although there has been a failure to keep the dates assigned by it, if justice can be done between the parties and if nothing in (a) the express stipulation of the parties, (b) as the surrounding circumstances, make it inequitable to grant relief. An intention to make time of the essence of the contract must be expressed in unmistakable language; it may be inferred from what passed between the parties before, but not after, the contract is made. It was also laid down in that case that "equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time."

13. In the case of "Seth Essabhoy v. Saboor Ahmad" **(PLD 1973 SC 39)**, it was observed as under:

> "It is a well settled principle of law that in contracts relating to immovable property, time is not of the essence of the contract, and the claim of the appellant, even if it were accepted that he had given three days' notice to the respondent for completion of the contract, failing which it

would come to an end, cannot at all be considered to be reasonable time."

14. It the case of "Mst. Amina Bibi v. Mudassar Aziz" **(PLD 2003 SC 430)**, it was observed by the Hon'ble Supreme Court that:

> "It is well-settled that intention to make time of the essence of the contract must be expressed in unmistakable language and it may be inferred from what passed between the parties before, but not after, the contract was made. A mere mention of a specific period in an agreement for completion of sale has been held as not to make the time of essence of the contract. In contracts of sale of immovable property, ordinarily, time is not considered to be of essence of the contract unless it was expressly intended by the parties and the terms of contract do not permit of any other interpretation."

15. In the case of "Muhammad Iqbal v. Mehboob Alam" **(2015 SCMR 21)**, it has been held as under:

> "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. The appellant/ defendant has failed to do so in the instant case."

16. Another related question is whether time may be made essence of the agreement subsequent to the making of the agreement sought to be specifically enforced. In the case of "Mrs. Mussarat Shaukat Ali v. Mrs. Safia Khatoon and others" **(1994 SCMR 2189)**, it was authoritatively held by the Apex Court that

> "It may also be mentioned here that where the parties have not treated the date fixed for performance of the contract relating to immovable property as the essence of the contract at the time of entering into the agreement, subsequently, one of the parties to the contract cannot unilaterally make the time as the essence of the contract (see Abdul Hamid v. Abbas Bhati, PLD 1962 SC 1)."
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> (Emphasis added)

17. Earlier this issue was dealt with by the Apex Court in the case reported as "Abdul Hamid v. Abbas Bhai-Abdul Hussain Sodawaterwala" **(PLD 1962 SC 1)**, where the following observations were made:

> "The principle, that if time is not originally made of the essence of a contract for sale of land one of the parties is not entitled afterwards, by notice, to make it of the essence, unless there has been some default or unreasonable delay by the other party, was laid down as long ago as 1879 by Fry J. in green v. Sevin (3). That principle was reaffirmed in Smith v. Hamilton and another (4). The following extract from Fry J,'s judgment in Green v. Sevin was, inter ilia, cited with approval by Harman, J. in the last named case:-
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> What right then had one party to limit a particular time within which an act was to be done by the other? It appears to me that he had no right so to do, unless there had been such delay on the part of the other contracting party as to render it fair that, if steps were not immediately taken to complete, the person giving the notice should be relieved from his contract. It has been argued that there is a right in either party to a contract by notice so to engraft time as to make it of the essence of the contract where it has not originally been of the essence, independently of delay on the part of him to whom the notice is given. In my view there is no such right. It is plain upon principle, as it appears to me, that there can be no such right. That which is not of the essence of the original contract is not to be made so by the volition of one of the parties, unless the other has done something which gives a right to the other to make it so. You cannot make a new contract at the will of one of the contracting parties. There must have been such improper conduct on the part of the other as to justify the rescission of the contract sub moto, that is, if a reasonable notice be not complied with. That this is the law appears to me abundantly plain.
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> This proposition has received the support of standard text books on the subject-See Fry on Specific Performance Para. 1092, 6th Edition, and Cheshire & Fifoot on Contracts, page 450, 5th Edition."

18. No doubt, a date was fixed in the agreement within which the parties were required to fulfil their part of the contract, however time was extended with the handwriting of the husband of attorney of the

respondent, scoring off the last date for payment i.e. 15.01.2004 by writing ***"the execution date shall be decided at the end of April 2004"***. There is no clinching evidence as to which of the parties dithered. Both the parties have attempted to shift the blame on to the other and have maintained that they were ready to fulfil their respective part of the agreement, but it cannot be overlooked that no notice whatsoever was given by the respondent/defendant to the appellant, calling upon him to complete the execution and registration of the sale deed in his favour by expressing his readiness to perform his part of the contract. Though, appellant has pleaded that he has approached the respondent through his attorney and offered a cheque for an amount of Rs. 6.00 million, but he did not meet with the attorney of the respondent, therefore handed over the same to the common estate agent for delivery to the attorney of the respondent, who subsequently returned the same to the appellant and stated that the attorney of the respondent has refused to receive the same, thereafter respondent's attorney issued notice to the appellant and apprised him regarding the cancellation of the agreement to sale with directions to collect the earnest money at any time without filing a suit for cancellation of agreement to sell. Moreover, the respondents had no right to cancel the agreement unilaterally as held by the learned Division Bench of the Lahore High Court in ***PLD 1999 Lahore 193***. Even otherwise, there was no provision in the agreement for its cancellation by either of the parties. Furthermore, by ignoring the admission of the respondent in respect of the agreement to sell, the terms and conditions thereof, and in disregard of the fact that the defence set up by the respondent was never in relation to the willingness of the appellant, rather it was related to the plea time being the essence of the contract.

19. For what has been discussed above, the impugned judgment and decree passed by the learned Single Judge is set aside; the suit of the appellant is decreed in the terms as prayed. Since the properties in the recent past have been increased in valuation and currency has been

depreciated, therefore appellant is directed to deposit an additional amount of Rs. 14,000,000/- i.e. the double of Rs. 7,000,000 (that being so, let the appellant deposit the said amount with the Nazir of this court, an additional amount of Rs. 14,000,000/- as the balance sale consideration within 2 months from today). Respondent is directed to deposit all the original title documents of the full property with the Nazir within 15 days and within the next 15 days from the deposit of title documents, the respondent shall execute a sale deed in respect of suit property in favour of the appellant before the Sub-Registrar concerned in presence of the Nazir. Simultaneously, the Nazir shall hand over all the original title documents of the suit property to the appellant and pay the sale consideration amount to the respondent after deduction of all the outstanding taxes, charges, bills and cesses. In case the respondent fails to execute the sale deed in favour of the appellant within the stipulated period, the Nazir shall execute the same in favour of the appellant. Thereafter, respondent is also directed to hand over the vacant possession of the suit property to the appellant. The parties shall bear their own costs.

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Announced on 08.08.2018

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