

the day of execution of proper sale deed in her favour. The Respondent avoided to provide relevant papers on the pretext that the same were not available with him at that time. Applicant repeatedly approached the Respondent time and again but the Respondent persistently avoided to finalize the sale transaction. Therefore, the Applicant sent legal notice dated **13.03.1979** to the respondent calling upon him to execute a proper sale deed in respect of the suit property and also informed that the Applicant is ready to pay the balance amount as soon as the Respondent executes the sale deed in her favour. The Respondent, however, refused to receive the said notice and to the contrary sent a legal notice through his advocate claiming that he has cancelled sale agreement and advance payment stand forfeited. The applicant promptly replied the legal notice from the respondent and after exchange of few more letters, the applicant on **31.5.1980** filed suit for specific performance of the Contract against the Respondent before this Court as at the relevant time this Court had the pecuniary jurisdiction to entertain such suits. The Respondent filed his written statement stating therein that the applicant could not arrange the balance amount of Rs.50,000/- towards sale consideration within the stipulated period and the Respondent, therefore, through his advocate's letter dated **12.03.1979** has cancel the agreement dated **28.05.1978** and forfeited the advance money in terms of the sale agreement.

4. In **1997** on change of pecuniary jurisdiction of High Court, the suit was transferred to lower Court where it was re-numbered as Suit No.230/1997 and ultimately assigned to the IInd Senior Civil judge, Central, Karachi. The trial Court from the pleadings of the parties settled the following issue.

- i. Whether the suit property is in complete construction?
- ii. Whether the balance sale consideration was to be paid to the Defendant by the Plaintiff at the time of execution and registration of proper Sale Deed or within one month of date of agreement dated 28.5.78?
- iii. Whether the Plaintiff has sent to the Defendant letter dated 13.3.79 through her advocate?

- iv. Whether the Defendant after intimating the Plaintiff by his letter dated 12.3.1979 was entitled to rescind or cancel the agreement and forfeit the earnest money?
- v. Who committed the breach of contract? if the Plaintiff has committed the breach of contract, what is its effect?
- vi. Whether in the circumstances of case, Plaintiff is entitled to the relief of specific performance of the contract?
- vii. What should the decree be?

The applicant/plaintiff examined herself through attorney namely Muhammad Shahid Zaki, her son. He produced power of attorney executed by the applicant as **Ex. P-2** and also produced following documents.

- i. **Ex.P-3** Sale agreement dated 28.5.1978 executed between the parties
- ii. **Ex.P-4** Receipt of payment of Rs.30,000/- dated 28.5.1978
- iii. **Ex.P-5** Receipt of payment of Rs.30,000/- dated 11.06.1978
- iv. **Ex.P-6** Notice from applicant dated 13.3.1979
- v. **Ex.P-7** Legal notice from Respondent dated 12.3.1979
- vi. **Ex.P-8** Reply of legal notice by applicant dated 21.3.1979
- vii. **Ex.P-9** Reply to the reply of legal notice by Respondent dated 25.3.1979
- viii. **Ex.P-10** Reply of applicant's legal notice dated 25.3.1979
- ix. **Ex.P-11** Another legal notice from applicant dated 11.4.1979
- x. **Ex.P-12** Reply from respondent dated 21.8.1979
- xi. **Ex.P/13 to Ex.15** Envelope containing legal notice dated 13.3.1979 alongwith registered A.D and postal receipt

The Respondent has expired during the pendency of suit. One of the legal heirs of the Respondent namely Abdul Jabbar Khan examined himself as **Ex.D-1** and produced Power of Attorney executed by other LR's of deceased respondent Bundoo Khan in his favour as **Ex.D-2**.

5. The learned trial Court decreed the suit filed by the respondent. The operative part of decree dated **07.05.2003** is reproduced below:-

“... that plaintiff has succeeded to prove her case therefore suit of the plaintiff is decreed as prayed with no order as to cost, **subject to deposit of Rs.50,000/- with the Nazir of the Court by the plaintiff within one month due and payable by the plaintiff to the defendant** on account of balance sale consideration in case the defendant does not execute the documents such documents shall be executed by the Nazir of District Court. The entire cost and expenses in respect of transfer of the suit property shall be paid and borne by the plaintiff.”

The applicant/Plaintiff in terms of judgment and decree of the trial court has deposited balance sale consideration of Rs.50,000/- within one month with the Nazir of the trial court. The Appellate Court, however, reversed the findings of the trial court by judgment dated 15.01.2007, in appeal No.84/2003. The operative part of the appellate decree is reproduced below:-

“It is hereby ordered that the appeal in hand is allowed to the extent to set aside judgment and decree dated 30.4.2003 and 7.5.2003 as there was no condition for forfeiture of paid amount in agreement therefore, the **appellant is directed to return back the forfeited amount i.e. Rs.60,000/- to respondent within 15 days of this judgment.**”

The respondent till today has not returned the amount of **Rs.60,000/-** which the respondent was supposed to return within 15 days from **15.01.2007**. Nor they have even offered it.

6. I have heard learned counsel for the applicant and counsel for the Respondent and perused the record. It has been contended by the counsel for the applicant that the appellate court has ignored the entire findings based on reasoning and framed an issue at appellate stage which was neither raised by the respondent nor such issue was settled by the trial Court and reversed the findings. She has contended that even in the memo of appeal the appellant has not pleaded that the time was the essence of the contract. None of the issues framed and decided by the trial court have been examined by the appellate Court and the appeal was decided without examining /reading of evidence in its true perspective. She has further contended that learned Appellate Court further failed to appreciate from the evidence that it was the Respondent who after having realized more than 60% of the total sale consideration turned dishonest and refused to execute the sale deed and unilaterally

rescinded the agreement and forfeited the advance though there was no clause of forfeiture.

7. Learned counsel for the respondent has only contended that according to the agreement the remaining amount of Rs.50,000/- was payable at the time of finalization of sale, which was to be done within one month and therefore, when it was not finalized within one month the agreement was cancelled. The Appellate Court according to him has rightly held that the applicant has failed to finalize the contract within one month and the time of one month was essence of the contract. However, to the question from the court that why earnest/advance amount of Rs.60,000/- was not returned by the Respondent, his innocent reply was that the untimely death of Bundoo Khan, the predecessor of the respondents, has rendered the circumstance of Respondents so poor that they could not refund the said amount. He admits that advance payment of Rs.60,000/- has not been refunded even till today after more than 25 years of the death of Bundo Khan.

8. The learned Appellate Court has reproduced **Section 55** of the Contract Act, 1872 in the impugned order but he has failed to refer to the attending circumstancing from the given facts of the case that how the court gathered the impression that intentions of parties was that the time was essence of the contract. It is again reproduced below :-

Section 55 of the Contract Act, 1872.

55. Effect of failure to perform at fixed time, in contract in which time is essential.--- When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

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.

It is strange that the appellate court by referring to the sole clause of the sale agreement concluded that "time was essence of agreement to sale", and rest of the evidence was totally ignored. The only clause of the agreement is reproduced below:-

That the vendor above named has this day, received a sum of Rs.30,000/- (Rupees Thirty thousand only) from the Vendee being advance part payment towards the sale price of the said Property, the receipt whereof the Vendor does hereby fully acknowledge and also passes a separate receipt as well. That a further amount of Rs.30,000/- (Thirty thousand only) shall be paid by Vendee to the Vendor on **5th June 1978** being part payment, **while the remaining amount of Rs.50,000/- (Rupees Fifty thousand only) shall be paid at the time of finalization of this sale**, which will be **done within one month from today**. That the Vendor hereby assures to be the sole owner of said property which is free from all encumbrances and **all taxes and dues have been paid, if not paid the same will be paid by the Vendor himself**.

By now, it is settled law that in a case of specific performance of contract of immovable property where dispute arises between buyer and seller, the Court has to examine that which of the party is in breach of the contract. The appellate Court coming to the conclusion that time was essence of the contract failed to discharge its duty to find out who was guilty of not performing his part of the contract within time. In this regard conduct of the parties is the prime proof of dishonest behaviour in fulfilling their respective responsibility under the agreement of sale. The perusal of record shows that the deceased Respondent in his lifetime filed written statement in which he has admitted execution of sale agreement as well as payment of Rs.60,000/=. Therefore, it was only the correspondence which was supposed to be looked into to appreciate who turned dishonest and who was fair so that the court can reasonably exercise its discretion in favour of either side. The learned appellate court miserably failed to peruse the evidence on the record, and such failure of appellate court can be summarized as follows:-

- (i) Even from the relevant clause of agreement, the appellate court failed to notice the two expressions of intentions of the parties which are reproduced below:-

“The remaining amount of Rs.50,000/= shall be paid at the time of finalization of the sale;” and

“All taxes and dues have been paid , if not paid the same will be paid by the vendee (respondent) himself;”

Read with the casual expression of desire that :

“which will be done within one month from today”

have rendered the time of one month conditional and therefore, it was not essential.

- (ii) The first legal notice from the Respondent side (Ex. P-7) contained two dishonest gestures on his part; firstly, he declared sale consideration was **Rs.1,20,000/-** and secondly he forfeited the amount of **Rs.60,000/-** paid by the applicant to him and both contentions of respondent were not supported by the contents of the admitted sale agreement (Ex. P-3).
- (iii) There was no clause of forfeiture of the advance received by vendor/respondent from the vendee/applicant.
- (iv) He did not mention in his legal notice about his own responsibility under the sale agreement that all the taxes and other dues against the suit property were cleared by him within one month or not. He has neither cleared the dues/taxes nor he has given proof of having paid the taxes/dues against the property within one month.
- (v) The finalization of sale was subject to the proof of taxes have been paid by the respondents is provided.
- (vi) The respondent in his written statement has admitted the execution of sale agreement and payment of more than 60% advance from the total sale consideration and all the correspondences between them.

The above facts forms the part of the material available on record to get the impression about the intentions of the parties that time was or was not essence of the Court.

9. Apart from above factual aspect, the learned Appellate Court also failed in appreciating the true spirit of **Section 55** of the Contract Act, 1872. A bare reading of the said provision of law reveals that its operation is not by default. If at all, the time was essence of the contract and the Respondent was honestly willing to

take the benefit of it, he should have sent notice within one month warning the applicant that he would follow the time line strictly. **Section 55** of Contract Act, 1872 render an agreement “**voidable**” at the option of the promisee. The agreement was not inherently “**void**”, it was voidable and therefore it was required to be adjudged so by a competent forum after examining the facts of the case and the contents / language of the contract. The applicant on refusal of the respondent to perform his part of contract has filed suit for specific performance of contract in terms of **section 12** of the Specific Relief Act, 1877. In case the respondent firmly believed that the expression “**which will be done within one month from today**” as parties intention to treat the one month time as essence of the agreement, he should have filed suit for rescission and cancellation of the agreement of sale and obtained a decree from the court of law declaring that the agreement has become void in terms of **Sections 35** and **39** of Specific Relief Act, 1877 which are reproduced below:-

35. When rescission may be adjudged.--- Any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely:

- a) where the contract is voidable or terminable by the Plaintiff;
- b) where the contract is unlawful for causes not apparent on its face and the Defendant is more to blame than the Plaintiff;
- c) where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums which the Court has ordered him to pay.

When the purchaser or lessee is in the possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor.

In the same case, the Court, may, by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the

party in default or altogether, as the justice of the case may require.

39. When cancellation may be ordered.—Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

If the instrument has been registered under the Registration Act, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

It cannot be believed that after having forfeited (Rs.60,000) more than half of the agreed sale consideration, the respondent in terms of **Section 35** and **39** *ibid* had no “**reasonable apprehension**” that the said agreement of sale “**if left outstanding may cause serious injury**” to him. The applicant has not availed the remedy available with him to get the admitted agreement of sale adjudged as void and canceled by the Court. Therefore, the agreement was valid and enforceable at law, the legal notice by respondent (Ex.P/7) that he has cancelled the agreement and forfeited the amount of Rs.60,000/- was in fact nothing more than a refusal to finalize the sale without a just cause.

10. The appellate Court in the above facts on record should have appreciated that the dishonest respondent on the one hand relied on such terms and conditions of the agreement to his benefit which were not in the said agreement and he himself has failed to perform his part of the agreement of providing tax/dues payment receipts to finalize the deal within one month. Even in his written statement and evidence the respondent has not produced receipts of payment of due and taxes in respect of the suit property. The dishonest respondent forfeited Rs.60,000/- though it was not stipulated in the agreement. To be honest, he should have sent the earnest/advance money back to the applicant alongwith the legal notice dated **12.3.1979** (Ex.P-7) since it was not agreed by the parties that in case of default from either side the one side shall forfeit the advance or in his default

return the double the value of the advance to the other side. Likewise the appellate court as a court of equity while setting aside the decree should have appreciated that the respondent has been enjoying the fruits of both **Rs.60,000/=** (which was more than half of the sale price) and the possession of suit property in their use since **25.8.1978**, therefore, the appellate court should have ordered that in case of non-refund of part payment of sale consideration to the applicant within 15 days by the respondent, the decree of execution of sale deed in favour of the applicant who has already deposited entire balance sale consideration in the trial court shall be enforceable. Therefore, in the given facts of the case, the exercise of discretion in favour of respondent by the appellate court was not only contrary to the facts but also result of misapplication of law on the subject as discussed above. The Respondent but for this reason and his conduct narrated in para-7 above has disentitled himself for discretionary relief of Court in his favour. The applicant, on the other hand, for the simple reason that admittedly he has paid more than 60% of the sale consideration to the respondent and he has also promptly paid the balance sale consideration in Court which is still lying in Court has earned the discretion of Court on merit.

11. The crux of the above discussion is that the order of the appellate court was perverse and without application of mind both to the facts on record and the law on the subject. Therefore, this revision application is allowed, the appellate judgment is set aside, judgment and decree of the trial court is restored. Learned trial court is directed to execute sale deed in respect of the suit property within 15 days and ensure handing over possession of the suit property to the applicant by dispossessing / removing/ vacating the respondent or whoever is in possession of the suit property with police aid, without further notice.

JUDGE

Karachi
Dated:23.09.2016

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