IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1472 of 1998
[Abdul Qadir v. Mrs. Ameer Zadi and other]

Suit No.1062 of 1999
[Mrs. AmeerZadi and others v. Abdul Qadir]

Dates of hearing : 01.02.2019 and 30.04.2019.

Date of Decision : 16.09.2019

Suit No.1472 of 1998

Plaintiff : Abdul Qadir, through M/s. Raja Aftab Ahmed Khan and Raja Sanaullah, Advocates.

Defendants 1-8 : Mrs. AmeerZadi and 7 others, through Mr. Zahid F. Ebrahim, Advocates.

Defendant No.9 : Nemo.

Suit No.1062 of 1999

Plaintiffs : Mrs. Ameer Zadi and 7 others, through Mr. Zahid F. Ebrahim, Advocates.

Defendant : Abdul Qadir, through M/s. Raja Aftab Ahmed Khan and Raja Sanaullah, Advocates.

Case law relied upon by Claimant's Counsel (Plaintiff in Suit No.1472 of 1998)

1. 1995 S C M R page-1431
   [***Sandoz Limited and another v. Federation of Pakistan and others***]

2. 2007 S C M R page-1318
   [***West Pakistan Tanks Terminal (Pvt.) Ltd. v. Collector (Appraisement)***]

3. YLR 2016 page-2008 [Sindh]
   [Muhammad Habib and 2 others vs. Messrs Humayun Ltd and 3 others]

4. 2008 YLR page-71 [Lahore]
   [Mirza Muhammad Ashraf Baig vs. Rana Atta Muhammad]

5. 2011 CLC page-1787
   [Sardar Ali Shah and others vs. Ghufran Ullah and others]

6. 1999 SCMR page-378
   [Bashir Ahmed vs. Muhammad Luqman]

Case law relied upon by Owners Counsel (Defendant in Suit No.1062 of 1999)

1. 1995 SCMR page-1431
   [Sandoz Limited and another vs. Federation of Pakistan and others]

2. 2007 SCMR page-1318
   [West Pakistan Tanks Terminal (Pvt.) Ltd. vs. Collector (Appraisement)]

Other precedents:

1. 2004 CLD page-984
   [Messrs Ravians Paper and Board Industries Limited through Chief Executive vs. Messrs Taj Company Limited through Administrator]

2. 2004 CLD page-1396 [Karachi]
   [Investment Corporation of Pakistan vs. Sheikhupura Textile Mills Ltd and others]

3. PLD 1971 Supreme Court page 743
   [Syed Subte Raza and another vs. Habib Bank Ltd.]

4. PLD 2003 Supreme Court page-430
   [Mst. Amina Bibi vs. Mudassar Aziz)

Law under discussion:

1. Specific Relief Act, 1877 ***(SRA)***
2. Civil Procedure Code, 1908 (**CPC**)
3. Contract Act, 1872 ***(Contract Act)***
4. Qanun-e-Shahadat Order, 1984 ***(Evidence Law)***

JUDGMENT

Muhammad Faisal Kamal Alam, J: - Plaintiff *(Abdul Qadir son of Haji Qasim)* has filed the Suit No.1472 of 1998 against the Defendants (owners) in respect of a sale transaction concerning a built-up property bearing No.6/28 – D (Survey Sheet No.35 – P/1) P.E.C.H.S., measuring 2540 Square Yards (the "**Suit Property**"), with the following prayer clause_

"(a) Declare that the Plaintiff is entitled to return of earnest money of Rs.30,48,000/- (Rupees thirty lac forty eight thousand) plus another amount of Rs.30,48,000/- (Rupees thirty lac forty eight thousand) representing liquidated damages plus Rs.50,00,000/- (Rupees fifty lac) representing the price differential i.e. damages and mark up till the date of payment from and payable by the Defendants Nos.1 to 8;

(b) award damages against the Defendants Nos.1 to 8 and direct the said Defendants to make payments to the Plaintiff in terms of (a) above;

(c) pending disposal of the main suit attach the suit property, appoint a receiver thereon and restrain the Defendants Nos. 1 to 8 from selling and encumbering the same and Defendant No.9 from registering and transferring or encumbering the property in any manner;

(d) award cost;

(e) award any other relief."

2. ***Whereas***, the owners of the above suit property subsequently filed Suit No.1062 of 1999 against the above named purchaser, claiming Damages and compensation. Plaint contains the following clause_

"(i) a sum of Rs.10,160,000/- (Rupees ten million one hundred and sixty thousand only) being the loss due to decrease in the market value of the said Property, which is computed on the basis of the difference in the contractual price of Rs.12,000/- per square yard and the price which was prevalent at the time of the breach of the contract of the said property by the defendant which was Rs.8,000/- per square yard;

(ii) A sum of Rs.1,115,000/- (Rupees one million one hundred and fifteen thousand only) being loss of rental income @ Rs.135,000/- per month for 9 months from 01.10.1998 to 30.06.1999, which represents the period when no income was derived by the plaintiffs from the said Property as by then all tenants have vacated the said Property;

(iii) A sum of Rs.1,800,000/- (Rupees one million and eight hundred thousand only) being the amount paid by the plaintiffs to their tenants to get the property vacated in order to make it available for the defendant in vacant position;

(iv) A sum of Rs.575,000/- which the plaintiffs No. 6 and 3 paid as earnest money for the purchase of flat and plot but which money was forfeited in favour of the sellers as a result of non completion of sale which was a direct consequence of breach of contract by the defendant;

(v) award interest/equalizer at the rate of 15% per annum with quarterly rests from the date of the institution of this suit till the realization of all sums, which may be awarded to the plaintiffs in this suit;

(vi) any other sum, which in the circumstances of the case the plaintiffs become entitled to; and

(vii) costs of the Suit."

3. Since cross suits have been filed, therefore, in order to avoid any confusion about identification of parties hereto, it would be appropriate if the owners of the Subject Property, who have filed the subsequent Suit No.1062 of 1999, may be referred to as **'Owners**' and the above named Abdul Qadir, who has filed a prior ***lis*** – Suit No.1472 of 1998, be referred to as '**Claimant'**.

4. Vide an order dated 23.10.2000, Suit No.1472 of 1998, instituted by the Claimant, is to be treated as leading Suit and on 15.01.2001, following consolidated Issues were framed_

"1. Whether the plaintiff was ready and willing to perform his part of the contract?

2. Whether the defendant refused to perform their part of contract. If so what its effect?

3. Whether the plaintiff is entitled for refund of the earnest / advance payment?

4. Whether the plaintiff is entitled for the penalty / liquidated damages, if so what would be its quantum?

5. Whether the time was essence of the contract?

6. Whether the defendant has suffered loss on account of breach of contract on the part of the plaintiff. If so what would be its quantum?"

5. Both the parties – Owners and Claimant led the evidence.

6. Findings on the Issues are as follows:

F I N D I N G S

ISSUE NO.1.	Negative.
ISSUE NO.2.	Negative.
ISSUE NO.3.	Negative.
ISSUE NO.4.	Negative.
ISSUE NO.5.	Negative.
ISSUE NO.6.	Affirmative. Hence, the leading Suit No.1472 0f 1998 is dismissed and Suit No.1062 of 1999 is decreed to the extent that Claimant is liable to pay an amount of Rs.2,081,260/- *(Rupees Twenty Lac Eighty One Thousand Two Hundred Sixty only)* as damages to Owners and Owners are entitled to forfeit the earnest money. Parties to bear their costs.

R E A S O N S

7. Mr. Raja Aftab Ahmed, Advocate, on behalf of the Plaintiff (above referred Claimant) in Suit No.1472 of 1998, has argued that a substantial amount was paid to Defendants in Suit No.1472 of 1998 (above named Owners) in pursuance of the Sale Agreement dated 18.03.1998 (**Exhibit P/2**) for purchasing the suit property owned by the said Owners, but the latter did not complete the sale transaction within the stipulated time, because of which the Claimant suffered losses. It is further argued that the entire sale transaction was to be completed within seven months as mentioned in Clause 1(b) in the above subject Agreement, that is, six months and one month grace period from the date of execution, but the

Owners miserably failed in their obligation(s) to effect mutation of the suit property in their names as legal heirs of (Late) Muhammad Hussain Dawood Arab, because the suit property stood in the name of above named deceased. It is averred that the Owners attempted to dispose of the suit property in order to strangulate proceeding of the leading suit. In this backdrop, the Claimant is seeking refund of entire earnest money of Rs.30,48,000/- paid to the Claimant together with the same amount as liquidated damages and Rupees Five Million being the price differential, as damages and markup. Learned counsel has relied upon the case law mentioned in the opening part of this decision.

8. On the other hand, Mr. Zahid F. Ebrahim, learned counsel for the Owners, has controverted the arguments of the learned Advocate for the Claimant. The defence setup by the Owners is that in fact it is the Claimant, who has defaulted in making a timely payment and in order to cover his inability for completing the transaction, he has resorted to filing of the above suit. It is further argued that on the contrary, the Owners have suffered losses, which they have quantified in their subsequent Suit No.1062 of 1999, in particular, paragraph 16 of the plaint so also mentioned in the prayer clause of this subsequent suit (reproduced herein above).

9. Both the parties led evidence and the Claimant examined himself as P.W.-1 and one other witness, namely, Muhammad Nisar, as P.W.-2; whereas, the Owners examined one of the co-owners / Defendants in Suit No.1472 of 1998, as D.W.-1.

10. It may be pertinent to mention here that initially the Suit No.1472 of 1998 was argued and the matter was reserved for Judgment. However, in the intervening period, the subsequent Suit No.1062 of 1999 was filed and

since the Claimant initially did not contest the subsequent suit, therefore, the matter was decided *ex parte*, vide Judgment and Decree dated 02.05.2000, which subsequently, by consent, was set aside by an order dated 14.06.2000, while further observing that both subject suits shall proceed together and common evidence will be recorded.

ISSUE NO.5:

11. Since Issues No.1 and 2 depend on this Issue No.5, therefore, it is decided first.

12. Following undisputed documents are relevant for deciding this Issue_

i) Sale Agreement dated 18.03.1988 – Exhibit P/2;

ii) Correspondence / notice dated 17.10.1988 addressed to the Owners on behalf of the Claimant, produced by the latter as Exhibit P/4;

iii) Notice dated 02.11.1998 addressed by the Advocate of the Claimant to the Owners-Exhibit P/5.

iv) Reply dated 12-11-1998 on behalf of the Owners to the above Notice (of 2-11-1998), produced in the evidence as Exhibit P/6.

13. Learned counsel for the Claimant has argued that a timeline as mentioned in Clause 1(b) in the subject Sale Agreement (Exhibit P/2), was not adhered to by the Owners and hence they committed breach of contract as time was the essence of contract, although the Claimant was ready to make the entire balance payment as mentioned in the subject Sale Agreement. This has been obviously controverted by the learned counsel for the Owners.

14. In his cross-examination, P.W.-1 (Claimant himself) has admitted that words "time is the essence of the contract" have not been written in the Agreement but the timeline of six months and one month grace period is clearly mentioned. The said witness has further acknowledged that on 18.10.1998, that is, only one day after the seven months' time period has lapsed, the said Claimant was not ready to perform his part of the contract. He has further testified that on his request, the original Agreement kept with the Mr. Tufail F. Ebrahim (Advocate), as a trust, was returned to the Claimant. A specific suggestion put to P.W.-1 (the Claimant) was admitted by him that on 25.01.1999, when the leading suit was fixed in Court, the said Claimant on a query of the Court with regard to his readiness to purchase the suit property, replied "in negative".

15. The P.W.-2 in his testimony cannot successfully corroborate the stance of Claimant. To a question, he stated that subject Agreement came to an end on 18.10.1998, which means, the day when one month grace period ended or at best a day thereafter. He has acknowledged in his cross-examination that Owners never denied to comply with the terms of the Agreement, "but after expiry of seven months, the Defendants cannot do so". The said P.W.-2 has further admitted (in his cross-examination) that no where in the subject Agreement, it is mentioned that time is essence of contract.

16. On the other hand D.W.-1 (sole witness on behalf of the Owners) cannot be contradicted in his cross-examination that time was not the essence of subject Agreement.

17. Learned counsel for the Owners has placed reliance on the judgment of **Sandoz Limited** (***supra***) 1995 S C M R page-1431, handed down by the Honourable Supreme Court, containing an exhaustive

discussion on Section 55 of the Contract Act, that is, how to determine whether or not parties have agreed in an agreement that time would be the essence of the contract. The gist of the rule laid down in the above discussion is ***(i)*** that, *inter alia*, it is not necessary that a particular date mentioned in an agreement should be treated as the time being the essence of the contract, but in case of ambiguity, the intention of the parties and other correspondence relevant to the contract should also be considered; ***(ii)*** usually in contracts involving sale of immoveable properties (which is the present case), time cannot be considered as the essence, unless express provision is mentioned in a contract itself. The three correspondences / notices mentioned hereinabove, viz. Exhibits P/4, P/5 and P/6 together with the above portion of the evidence of the parties is analyzed in the light of the aforementioned reported Judgment, then answer to this Issue is in negative, that time was not essence of the subject Agreement.

ISSUES NO.1 AND 2:

18. The Owners in their Counter Affidavit to the injunction application filed by the Claimant in the leading Suit and in the Written Statement have stated that they were ready to perform the subject Sale Agreement by 30.11.1998. It is not denied by the Claimant in his cross-examination that Owners were ‘ready to perform their part of the contract.”

19. On the other hand D.W.-1 (sole witness on behalf of the Owners) has deposed in his cross-examination that the period of seven months expired on 17.10.1998, but mutation was under process. He has denied the suggestion that in the intervening period, possession from the various tenants was not taken by the Owners. The said D.W.-1 could not be contradicted when he stated that all the tenants vacated the suit property between May 1998 and October 1998; it means, during **subsistence** of the

subject Agreement, Owners fulfilled one of their main obligations for making arrangement to handing over physical and vacant possession to Claimant. The said D.W.-1 has voluntarily stated that he had made a statement before the Court on 25.01.1999 (on the same day of hearing when the Claimant replied "in negative" as mentioned above) that the Owners were ready to hand over possession of the premises immediately under the subject Agreement, but the Claimant refused to take over the possession. It is also relevant to take into the account the aforementioned three notices exchanged between the parties hereto. First notice dated 17.10.1998 (Exhibit P/4) was sent when the six months time as mentioned herein above, **already expired** and hardly a day was left for expiry of one month grace period [as per Clause 1(b) of the subject Agreement]. The contents of this Notice ex facie a formal reminder to the Owners on the part of Claimant for completing the subject sale transaction. The second Notice (on behalf of Claimant) is of 02.11.1998 – Exhibit P/5. It has not been denied by the Claimant in his evidence that the first notice of 17.10.1998 was received by the owners on 20.10.1998, that is, even after lapse of grace period. In the second notice (Exhibit P/5) it is stated, *inter alia*, that since the Owners have committed default, therefore, they should return the earnest money of Rs.30,48,000/- to the Claimant in addition to the same amount towards liquidated damages and amount of Rs.5 Million towards the differential market price. The said notice was responded to by the Owners (Exhibit P/6 dated 12.11.1998), wherein it has been specifically stated that the above D.W.-1, who was dealing the entire sale transaction on behalf of other Owners, had a discussion with the estate agent of Claimant and informed the latter that mutation of the suit Property would be done in due course and the parties hereto; Owners and Claimant, can appear before the Sub-Registrar on 30.11.1998 to complete the sale transaction; in the said reply – Exhibit P/6, it was further mentioned that the Owners were

informed by the estate agent (Mr. Abdul Ghani) of Claimant, that purpose for sending the first notice of 17.10.1998 (Exhibit P/4) was to extend the time for completing the Sale Agreement. Even though in the plaint of leading Suit No.1472 of 1998, the Claimant has categorically attacked the contents of this last correspondent of 12.11.1998 – Exhibit P/6, as fake, incorrect and fabricated, but in his cross-examination, the Claimant has not denied the suggestion that the Owners had talked to Mr. Abdul Ghani, the broker / estate agent of the Owners after receipt of above referred Notice dated 17.10.1998 (on behalf of Claimant – Exhibit P/4); this falsifies the stance of the Claimant and substantiates that of the Owners, particularly, the contents of their above Reply dated 12-11-1998 (Exhibit P/6).

20. The above discussion leads to the conclusion that Claimant did not want to extend the time for completing the bargain. This conduct of Claimant is otherwise unreasonable and cannot be legally justified, inter alia, as time frame in a contract to sell an immoveable property is usually not strictly followed (already discussed in the preceding paragraphs), particularly, when a property like the present one is not a small property but **undisputedly had number of tenants** in its different portions, which is accepted by Claimant in his cross-examination. ***Secondly***, the assertion of Owners' witness [DW-1] that the suit property was got vacated from the tenants between May 1998 to October 1998, after payment of heavy compensation, has not been disproved by Claimant side. Testimony of Claimant manifests that he was not ready and willing to perform his part of the Contract. The anxiety of Claimant that suit property was not mutated by 17.10.1998, is misconceived in nature and apparently such 'concern' was created to resile from his commitments, because; ***(i)*** mutation in the name of legal heirs is a procedural matter, which was undisputedly under process and the Owners' witness has deposed that it was made on 30-11-1998;

(ii) the mutation process was to be done by the concerned Government Officials as per codal formalities and this exercise was beyond the control of Owners ***(iii) even otherwise,*** this type of situation is amply covered and remedied by **Section 18** of the SRA; ***(iv)*** subject Agreement contained indemnification clause (Clause 13) for protecting Claimant's interest. The case of *Mst. Amina Bibi* **{*supra, PLD 2003 SC 430*}** is relevant for solving this controversy. In this reported case, an objection of appellant (owner of property) was that due to an embargo in the bye-laws of the Society where property was situated, the sale transaction could not be completed. The Hon'ble Supreme Court rejected this plea of vendor about ban on sale of plot without seeking prior permission of the society. In this case it is further held, rather reiterated, that the time is not considered to be essence of the contract of sale of an immovable property. It would be advantageous to reproduce the relevant paragraphs_

> ***"7…...The submission of the learned counsel for the respondent that the restriction on transfer of a plot of the Society was not applicable to a person whose application for membership has been accepted by the Society, which could be obtained even after the completion of sale transaction is not without force. Learned counsel for the appellant was unable to meet this argument, which has a greater force."***

21. From the above, it can be concluded that even though in the last correspondence of 12.11.1998 – Exhibit P/6, the Owners reiterated their intention and willingness to complete sale transaction in question on 30.11.1998, but the Claimant was not interested and instead filed the present leading Suit. Thus, both Issues are answered in negative, that is, Claimant was not ready and willing to perform his part of contract and Owners did not refuse to perform their part of contract.

ISSUES NO.3, 4 AND 6:

22. Both the monetary claims of Claimants and Owners in these connected suits have to be considered in terms of Sections 73 and 74 of the Contract Act. It is a settled principle that to succeed in a claim of damages *(under Section 73),* one has to prove the same through a positive evidence; ***whereas,*** liquidated damages can only be granted (*under Section 74*) when, *inter alia,* aggrieved party proves the default / breach of the other. Reported judgments mentioned in the opening part of this decision fortifies this view, besides, ruling that when an earnest money can be forfeited.

23. Evidence led by both Parties with regard to the above Issues has been analyzed.

P.W.-1 (Claimant) did not deny that the Owners paid an amount of Rs.18,00,000/- (rupees eighteen hundred thousand) to the tenants for vacating Suit Property. The DW-1 (Owners' witness) in his testimony cannot be falsified that the above amount was paid to different tenants for handing over vacant possession to Claimant in compliance of subject Agreement. The said Claimant (P.W.-1) did not deny the rental amount of Rs.1,30,000/- per month, which the Owners used to get from the tenants. Claimant did not deny that the suit property remained unoccupied and vacant from 30.11.1998 to May 2000; which means, that Owners were deprived of rupees twenty three lacs and forty thousand.

24. The Owners' sole witness-D.W.-1 was not cross-examined on following paragraphs of his Affidavit-in-Evidence / examination-in-chief_

- Paragraph-5, in which the said D.W.-1 deposed that in the month of October 1998 a meeting was held between the Claimant, D.W.-1 and M/s Mehmood Sidat and Abdul Ghani, estate agents of respective parties viz. Claimant and Owners, in which the D.W.-1 (Owners'

witness) reiterated that mutation process will be completed in second or third week of November 1998 and parties would be able to appear before the Sub-Registrar on 30.11.1998 to complete the transaction.

- Paragraph-6, that Claimant met with one of the tenants at the Subject Property, namely, Iqbal Gulzar and advised him not to vacate the premises in question.

It is a settled rule of evidence that if a substantial piece of evidence of a party is not challenged in cross-examination then that portion of deposition is accepted by the opposite party.

25. The testimony of D.W.-1 about reletting of suit property from 01.07.1999 to Foundation Public School is supported by documentary evidence, viz. original Tenancy Agreement produced in the evidence as Exhibit D/13, wherein, tenure of tenancy is mentioned as five years, commencing from 1-7-99 to 30-6-2004, with a starting rental of rupees one lac and eighty thousand and the last year rent is stated as rupees two lac, thirty five thousand, nine hundred and two (Rs.235,902/-). However, it is also a matter of record that soon thereafter, due to litigation filed by different persons through the real brother of Claimant, namely, Abdul Ghaffar, the School was closed down at the suit premises. In the intervening period the premises was also sealed by Karachi Building Control Authority. The Claimant has also prayed for awarding damages towards loss of rental income, because the School was closed and the property was sealed. Since the closure of School and sealing of property was under judicial orders, therefore, no damages or compensation of Rs.1.8 million (as claimed) can be allowed.

Notwithstanding the above, it has been proved that the Suit Property eventually taken on rent by another entity-Pakistan Educational

Foundation, through Agreement to Lease, produced by the DW-1 as Exhibit D/15; as per Clause 2 whereof the tenancy was to commence from 01.07.2000; thus, the **suit property remained vacant from 30.11.1998 up to June 2000. T**he undisputed evidence of DW-1 (Owners' witness) that they were deprived of monthly rental income of Rs.1,09,540/-, which the Owners were receiving from old tenants **be taken as a base figure to calculate the loss of rental income from 30.11.1998 up to June 2000, that is, for nineteen months, even though,** mistakenly in the pleadings of Owners, they have pleaded Rs.135,000/- as rental income and the PW-1 (Claimant) has never denied this, but the fact of the matter is that the above amount of Rs.1,09,540/- is the correct one.

Therefore, the Owners are entitled for an amount of Rs.2,081,260/- *(Rupees Twenty Lac Eighty One Thousand Two Hundred Sixty only)*, which the Claimant is liable to pay. Similarly, the testimony of DW-1 (Owners) about losses incurred (of Rs.10,160,000/-) due to price difference on the date of subject Agreement and when the breach was committed; for carrying out necessary repair and renovation work after vacation of old tenants from the Suit Property, could not be convincingly proved, hence, claim of Rs.350,000/- as averred is rejected, so also the claim of Rs. 880,000/- towards difference of monthly rent, when the suit Property was earlier given to above School and subsequently to the said Foundation.

26. The discussion in the preceding paragraphs has to be considered in the light of the reported Judgments (mentioned in the opening part of this decision). After a detailed treatment of the law points, it is held in the Ravians case ***(supra,*** *2004 CLD 984)*, that an earnest money/deposit given by vendee to vendors (in the present case, Claimant and Owners, respectively) is part of the purchase price when the transaction goes

forward, **but, it is forfeited** when the transaction falls through by reason of fault or failure of vendee.

The gist of the case law relied upon by Claimant's side is that (i) the Court has ample power to grant compensation in terms of Section 19 of the ***SRA***; (ii) the scope of Section 35 of SRA relating to *rescission* of contract by filing proceeding, if a purchaser fails to pay money or other sums despite the Court orders; (iii) where there is no default attributed to a person, who has brought a suit for specific performance then a decree can be granted. The decision of Hon'ble Supreme Court in Bashir Ahmed case ***(ibid,*** *1999 SCMR 378,* cited by Claimant*)* relates to the scope of Article 163 of the Evidence Law and if the Court comes to the conclusion that agreement of sale is validly executed by the parties and anyone is neglecting to perform his obligation, then the suit should be decreed. With respect, rule laid down in the case law relied upon by learned Advocate representing the Claimant, including the above last decision is not applicable to the facts of the present case, in which the Claimant / Plaintiff of the leading suit himself is seeking a relief of monetary claim and not prayed for a decree of specific performance of the contract.

27. Claimant has invoked Clause 4 of the Subject Agreement, which saddled the Owners with a liability to pay amounts towards refund of the earnest money, same amount as penalty and further rupees five million as damages, but, in the event, the latter (Owners) commit breach of their contractual obligations. Conclusion of the above discussion is that the Claimant has not led any positive evidence about his different monetary claims; thus failed to discharge burden of proof. Similarly, P.W.-2 has also not testified anything about the monetary claim of Claimant. The Owners neither committed breach of contract, nor, defaulted in performing their part of the obligations, which can justify invoking the Clause 4 above to the

present case. Conversely, the appraisal of evidence leads to the conclusion that it was the Claimant who backed out from his promise, particularly, at the crucial time, when the Suit Property got vacated from tenants and thus Owners were deprived of running income in the shape of monthly rentals. Claimant is in breach of his contractual obligations and failed to complete the subject sale transaction; thus in the present circumstances, Clause 5 of the subject Agreement is to be invoked, which makes the Claimant liable to pay liquidated damages equivalent to ten percent of the sale consideration. Since, Claimant had already paid 'part money'/earnest money of Rs.30,48,000/- to Owners, which is in fact 10% of the total sale consideration, therefore, the same stands forfeited in favour of the Owners. Issues No.3 and 4 are answered in negative, whereas, Issue No.6 is in affirmative, to the extent that Owners are entitled to an amount of Rs.2,081,260/- (as determined above) in addition to above amount of earnest money / 'part money'.

28. Hence, the leading Suit No.1472 0f 1998 is dismissed and Suit No.1062 of 1999 is decreed to the extent that Claimant is liable to pay an amount of Rs.2,081,260/- *(Rupees Twenty Lac Eighty One Thousand Two Hundred Sixty only)* as damages to Owners and Owners are entitled to forfeit the earnest money.

29. Parties to bear their costs.

JUDGE

Karachi Dated: 16.09.2019

M.Javaid.PA