

NOT ANNOUNCED – PARTIES COMPROMISED

Judgment Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1068 of 2003

Before :

Mr. Justice Nadeem Akhtar

Date of hearing : 29.11.2012.

Plaintiff : Aslam Pervaiz through
Mirza Sarfaraz Ahmed Advocate, along with the plaintiff.

Defendant : Mst. Naseem Fatima through
M/s Sher Ali Rizvi and Jawaid Musarrat advocates.

J U D G M E N T

Nadeem Akhtar, J.- This Suit for specific performance, declaration and permanent injunction has been filed by the plaintiff against the defendant in respect of Plot No. A-163, Block No.5, KDA Scheme No.24, Gulshan-e-Iqbal, Karachi, measuring 240 sq. yds., with a double storey bungalow constructed thereon (the suit property).

2. The relevant facts of this case are that the plaintiff and the defendant entered into an Agreement of Sale dated 14.04.2003 (the Agreement), whereby the defendant agreed to sell the suit property to the plaintiff and the plaintiff agreed to purchase the same from the defendant in consideration of Rs.3,000,000.00. At the time of execution of the Agreement, the plaintiff paid to the defendant a sum of Rs.300,000.00, being 10% amount of the agreed sale consideration. Under Clause 2 of the Agreement, the plaintiff was required to pay the balance sale consideration of Rs.2,700,000.00 to the defendant at the time of execution of the sale deed and relevant documents for the transfer of the suit property in his favour by the defendant. It was agreed by the parties vide the said Clause 2 that the plaintiff will pay the said balance sale consideration to the defendant within 90 days, or at any later day, when both the parties are present before the Sub-Registrar. After receiving the balance sale consideration from the plaintiff and executing the sale deed in his favour, the defendant was required to handover the original title documents and the possession of the suit property to the plaintiff. It was agreed vide Clause 5, that

the Agreement was irrevocable, and that the time prescribed therein for completion of the transaction was of the essence of the contract.

3. The plaintiff has averred that he was residing in a rented house, and that he entered into the Agreement with the defendant in order to purchase the suit property as he wanted to have his own house. He has averred that before the expiration of the period of 90 days mentioned in the Agreement, he verbally asked and reminded the plaintiff to convey the suit property in his favour within the agreed time as he was ready to pay the balance sale consideration to the plaintiff. The plaintiff has further averred that, as the defendant was avoiding to meet him, he sent a legal notice dated 28.06.2003 to the defendant calling upon her to complete the sale in his favour within the agreed time. It was stated by the plaintiff in this legal notice that he was not ready to extend the time for completion of the sale in his favour, and that he was ready to pay the balance sale consideration to the defendant. As the defendant did not respond to the said legal notice, the plaintiff sent a second legal notice dated 15.07.2003 in the above terms, and requested the defendant to accept the balance consideration from him. It is the case of the plaintiff that despite his above demands and willingness to pay the balance sale consideration, the defendant did not perform her agreed part of the contract. In the above background, this Suit has been filed by the plaintiff praying *inter alia* that a decree for specific performance of the Agreement be passed against the defendant, the possession of the suit property be handed over to him, and the defendant be restrained from creating any type of third party interest in the suit property.

4. In addition to the above prayers, the plaintiff has also prayed for a decree against the defendant for a sum of Rs.33,500.00 per month from the date of filing of the Suit till the possession of the suit property is handed over to him. General damages in the sum of Rs.500,000.00 have been sought by the plaintiff against the defendant on account of the mental agony allegedly suffered by him because of the alleged breach committed by the defendant. Special damages in the sum of Rs.600,000.00 have also been sought against the defendant by the plaintiff on the ground that, in order to arrange the balance sale consideration payable to the defendant, he had to sell his plot in a haste at a price which was much lower than the market value, causing loss of Rs.600,000.00 to him.

5. In her written statement, the defendant has denied all the averments and allegations contained in the plaint, but execution of the Agreement and receipt of Rs.300,000.00 from the plaintiff have been admitted by the defendant. Regarding the legal notices issued by the plaintiff, the defendant has denied the receipt thereof. The defendant has claimed that the plaintiff was never

interested in paying the balance sale consideration to the defendant or in purchasing the suit property, as he requested the defendant three to four days prior to the expiration of 90 days mentioned in the Agreement in the presence of witnesses, to cancel the Agreement and for the return of the advance part payment of Rs.300,000.00. The defendant has further claimed that she had informed the plaintiff that the said part payment will be forfeited in case the balance sale consideration is not paid by the plaintiff to her within the specified time. It has also been averred by the defendant that she had informed the plaintiff that he must honour his commitment as her husband had entered into an agreement with a third party for the purchase of a flat by making a part payment of Rs.500,000.00, and that in case the balance sale consideration of the said flat was not paid to the vendor by 20.07.2003, the part payment made by the defendant's husband will be forfeited. The defendant has alleged that because of the alleged breach committed by the plaintiff, the defendant's husband could not pay the balance sale consideration of the flat purchased by him due to which not only the deal was cancelled, but the part payment of Rs.500,000.00 made by the defendant's husband was also forfeited. It has been alleged by the defendant that it was the plaintiff who failed in performing his agreed part of the contract as he did not arrange or pay the balance sale consideration within the time specified in the Agreement, and as such the Agreement cannot be enforced as it stood terminated.

6. Along with the plaint, an injunction application was filed by the plaintiff praying that the defendant be restrained from creating third party interest in the suit property till the disposal of the Suit. By Order passed on 06.04.2004, the plaintiff's injunction application was disposed of with the consent of the defendant, subject to deposit of the entire balance sale consideration by the plaintiff with the Nazir of this Court. In compliance of the said Order, the plaintiff deposited the entire balance sale consideration of Rs.2,700,000.00 in April 2004 with the Nazir, who invested the said amount in a profit bearing scheme. Thereafter, vide Orders dated 10.01.2005 and 29.05.2008, the plaintiff was allowed to receive the profit accrued on the aforementioned amount.

7. In view of the pleadings of the parties, the following five issues were settled by the Court on 10.01.2005 :

- “1. *Whether there is any breach of agreement dated 14.04.2003 ? If so. By whom ?*
2. *Whether the plaintiff is entitled to the relief of specific performance ?*
3. *Whether the plaintiff is entitled to damages to the tune of Rs.6,00,000/- from the defendant. ?*

4. *Whether the defendant committed default of court order dated 02.10.2003 and 06.04.2004 ?*

5. *What should the decree be ? ”*

8. In support of his case, the plaintiff examined himself and one Abdul Raheem. The plaintiff produced a certificate and a letter from her landlady in order to show that the plaintiff was her tenant (Exh. P/1 and P/2), receipt dated 14.04.2003 executed by the defendant for Rs.300,000.00 received by her from the plaintiff (Exh. P/4), Agreement of Sale dated 14.04.2003 (Exh. P/5), the public notice inviting objections published in daily 'Jisarat' of 20.04.2003 (Exh. P/6), transfer order dated 27.07.1995 of plot No. 100/A, Block-10, Gulistan-e-Jauhar, Scheme 36, Karachi, in the name of the plaintiff, and the agreement of sale dated 18.04.2003 signed by the plaintiff in respect of his above plot (Exh. P/6-1), bank statement (Exh. P/6-2), legal notices dated 28.06.2003 and 15.07.2003 (Exh. P/7 and P/9), TCS receipts (Exh. P/8 and P/10), statement of account prepared by the plaintiff (Exh. P/11), plaintiff's letters dated 02.02.2005 and 03.02.2005 to the Manager, National Saving Centre, Gulshan-e-Iqbal Branch, Karachi (Exh. P/12 and P/13), bank statements (Exh. P/14 and P/15), and delivery confirmation certificate issued by TCS (Exh. P/16).

9. On behalf of the defendant, the defendant's husband / attorney and two other persons ; namely, Kamran Musharaf and Qadir Ahmed came into the witness box. One Syed Shahabuddin filed his affidavit-in-evidence on behalf of the defendant, but he did not come into the witness box for cross examination. The plaintiff's husband / attorney produced the power of attorney as Exhibit D-1, purportedly executed in his favour by the defendant.

10. Mirza Sarfaraz Ahmed, the learned counsel for the plaintiff submitted that, by paying the 10% amount of the agreed sale consideration at the time of the Agreement and by repeatedly offering the balance 90% amount to the defendant within 90 days, the plaintiff successfully performed his agreed part of the contract. He submitted that the defendant has not only admitted the execution of the Agreement in favour of the plaintiff, but has also admitted having received 10% amount of the agreed sale consideration from the plaintiff at the time of the Agreement, and further, that the said amount paid by the plaintiff is still lying with her. He contended that under Clause 2 of the Agreement, it was specifically agreed by the parties that the plaintiff was obliged to pay the balance sale consideration to the defendant at the time of execution of the sale deed of the suit property in his favour within 90 days of the Agreement, that is, on or before 14.07.2003, subject to the delivery of the original title documents and the possession of the suit property to the plaintiff. The learned counsel argued that the breach of the Agreement was committed

by the defendant and not by the plaintiff, as she failed to execute the sale deed in favour of the plaintiff and to handover to him the original title documents as well as the possession of the suit property. He further argued that the main reason for committing the breach of the Agreement was that the market value of the suit property had increased and the defendant wanted to sell the suit property to some third party at a higher price. The learned counsel submitted that the plaintiff was always ready and willing to perform his agreed part of the contract, and after depositing the entire balance sale consideration of Rs.2,700,000.00 with the Nazir in April 2004, the plaintiff successfully completed the performance of his entire part of the contract, whereafter nothing was/is required to be done by the plaintiff. Without prejudice to his above submissions, the learned counsel submitted that time is not of the essence of the contract in cases of immovable properties even if it is mentioned in the agreement. In the end, he submitted that the defendant's husband / alleged attorney had no power or authority to give evidence on behalf of the defendant, as the Special Power of Attorney (Exh. DW-1) produced by him did not authorize him to do so. Therefore, the entire evidence given by the defendant's husband / alleged attorney is liable to be discarded and ignored. The learned counsel prayed that the Suit may be decreed as prayed by the plaintiff.

11. The learned counsel for the plaintiff cited and relied upon (1) Seth Essabhoy V/S Saboor Ahmad, **PLD 1973 Supreme Court 39**, (2) Zaheer Ahmad and another V/S Abdul Aziz and others, **1983 SCMR 559**, (3) Muhammad Ayyub Khan V/S Ch. Muhammad Aslam and others, **1984 CLC 2159 (Lahore) (Division Bench)**, (4) Messrs Pioneer Housing Society (Pvt.) Limited V/S Messrs Babar & Company through Shakir Ali Khan and 2 others, **PLD 1999 Lahore 193 (Division Bench)**, (5) Mst. Shehar Bano V/S Mst. Badrunnisa and 5 others, **2007 CLC 1261 (Karachi)**, (6) Anjuman-e-Islamia, Sialkot V/S Haji Muhammad Younas and 3 others, **PLD 1997 Lahore 153**, (7) ISSO and another V/S Muhammad Ismail and 2 others, **1992 MLD 1787 (Karachi)**, (8) Inayat Ali and others V/S Siraj Din, **1997 SCMR 552**, (9) Muhammad Ayub through L.Rs. and others V/S Sheikh Muhammad Bashir and others, **2008 CLC 1704 (Lahore)**, (10) Saleem Akhtar V/S Nisar Ahmad, **PLD 2000 Lahore 385**, (11) Noor Muhammad V/S Fazal Mahmood and others, **2009 YLR 2359 (Karachi) 2359**, (12) Faheem Ahmed V/S Ata-ur-Rehman, **2007 CLC 1746 (Karachi)**, (13) Inayatullah V/S Muhammad Aslam Khan and 2 others, **1975 SCMR 314**, and (14) Messrs Eagle Star Insurance Co. Ltd. V/S Messrs Usman Sons Ltd. and others, **PLD 1969 Karachi 123**.

12. On the other hand, Mr. Sher Ali Rizvi, the learned counsel for the defendant, strongly opposed the submissions made on behalf of the plaintiff and reiterated the contents of the written statement. He submitted that the plaintiff is not entitled to the discretionary relief of specific performance, as the Suit is malafide, it is based on false and distorted facts, and the plaintiff has not come to the Court with clean hands. He further submitted the plaintiff was never interested in purchasing the suit property or in paying the balance sale consideration to the defendant, as he was not in a position to pay the same. In support of this submission, the learned counsel referred to the bank statements produced by the plaintiff in order to show that the amount of the balance sale consideration was not available in the bank account of the plaintiff at the relevant time. He also asserted that the plaintiff himself had asked the defendant prior to the expiration of 90 days mentioned in the Agreement in the presence of witnesses, to cancel the Agreement and for the return of the advance part payment of Rs.300,000.00. He contented that because of the breach committed by the plaintiff, the amount of Rs.500,000.00 paid by the defendant and her husband as part payment for purchasing a flat was forfeited, and they also lost the opportunity of purchasing the said flat, as the deal thereof was cancelled by their vendor because they could not pay the agreed price within time. The learned counsel then submitted that the alleged legal notices were fictitious documents, as the same were neither issued by the plaintiff nor were they received by the defendant. He argued that it is an admitted position that the balance sale consideration was not paid by the plaintiff within the time specified in the Agreement, therefore, the advance part payment made by the plaintiff stood forfeited and the Agreement stood terminated. The learned counsel prayed for the dismissal of the Suit.

13. In support of his submissions, the learned counsel for the defendant relied upon (1) Abdul Sattar V/S Mst. Sardar Begum and 12 other, **1992 SCMR 417**, (2) Federation of Pakistan V/S Messrs AlFarooq Flour Mills Ltd., **2000 CLC 215**, (3) Ahmad Bakhsh V/S Mst. Zeb Ilahi, **NLR 1981 Civil 75**, and (4) Mir Hashmat Ali V/S Birendra Kumar Ghosh and others, **PLD 1965 Dacca 56**.

14. Rebutting the submissions made by the learned counsel for the defendant, the learned counsel for the plaintiff strongly reiterated his submissions. He submitted that the plaintiff had every intention to purchase the suit property by paying the balance sale consideration to the defendant within the stipulated period, and in order to do so, the plaintiff not only sold his plot in a haste, but he also dissolved all the Saving Certificates owned by him as well as

the ones purchased by him in names of his wife and son. He further submitted that deposit of the entire balance sale consideration by the plaintiff in April 2004 with the Nazir of this Court belies all the assertions made by the defendant and supports the case of the plaintiff.

15. After perusing the pleadings of the parties, examining the evidence on record and hearing the learned counsel at length, my findings on the issues involved in this Suit are as under :

ISSUE NO.1 :

16. Issue No.1 ; namely, "*Whether there is any breach of agreement dated 14.4.03 ? If so. By whom ?* ", is the main issue which goes to the root of this case. It is an admitted position that the Agreement was executed by the parties and an amount of Rs.300,000.00, being 10% amount of the agreed sale consideration, was received by the defendant from the plaintiff at the time of the Agreement. It is also not disputed that the sale consideration was agreed at Rs.3,000,000.00. The dispute pertains to the payment of Rs.2,700,000.00, being the balance 90% of the agreed sale consideration, by the plaintiff within 90 days from the date of the Agreement. In the plaint as well as in his deposition, the plaintiff has asserted that before the expiration of the period of 90 days mentioned in the Agreement, he verbally asked and reminded the plaintiff to convey the suit property in his favour within the agreed time as he was ready to pay the balance sale consideration to the plaintiff ; as the defendant was avoiding to meet him, he sent a legal notice dated 28.06.2003 to the defendant calling upon her to complete the sale in his favour within the agreed time, and stating therein that he was not ready to extend the time for completion of the sale in his favour as he was ready to pay the balance sale consideration ; as the defendant did not respond to his legal notice, the plaintiff sent a second legal notice dated 15.07.2003 in the above terms, and requested the defendant to accept the balance consideration from him. Both the legal notices have been produced by the plaintiff in his evidence as Exhibits P/7 and P/9. The plaintiff has also produced the TCS receipts as Exhibits P/8 and P/10 showing dispatch of the legal notices, and also the delivery confirmation certificate issued by TCS as Exhibit P/16. According to Exhibit P/16, the legal notice was received by one Hina. In his cross examination, the plaintiff admitted that the legal notice was not received by the defendant personally, but he categorically stated that the same was delivered to Hina. It is an admitted

position that Hina is one of the daughters of the defendant, as this fact was admitted by the defendant's witness / husband in his cross examination.

17. In the cross examination of the plaintiff, the defendant's learned counsel confronted him only with regard to the first legal notice (Exh. P/7) by suggesting that the same was not sent by him to the defendant and that the TCS receipt in respect thereof was a forged document. These suggestions were denied by the plaintiff. The plaintiff was not confronted at all with regard to the second legal notice (Exh. P/9) as no suggestion was made to him and no question was asked from him in respect thereof and also in respect of the TCS receipt (Exh. P/10) showing dispatch of the second legal notice. This omission on the part of the defendant becomes more important as the plaintiff, in his cross examination, had insisted that he had sent both the legal notices (Exh. P/7 and P/9). The suggestion that the delivery confirmation certificate (Exh. P/16) issued by TCS was a forged document, was also denied by the plaintiff. As the second legal notice (Exh. P/9) remained unchallenged / unrebutted, the issuance thereof by the plaintiff stands proven. The evidence produced by the plaintiff regarding the issuance of the first legal notice (Exh. P/7), has remained unshaken in view of the specific denial by the plaintiff to the suggestion that the same was not sent by him.

18. The plaintiff has pleaded that, in order to arrange the balance sale consideration, he sold out his Plot No. A-100 in haste much below the market value due to which he suffered a substantial loss. In support of this plea, the plaintiff has produced the transfer order and agreement of sale in respect of the said plot as Exhibit P/6/1. The suggestion made to the plaintiff in his cross examination by the learned counsel for the defendant that the said agreement was not signed by the buyer, was explained by the plaintiff by stating that he sold his plot to Imran Associates by signing the agreement and leaving the name of the buyer open. It is a common practice that estate agents, after purchasing plots through agreements duly signed by the owners, retain the plots and sell the same to buyers at the time and price of their own choice. The plaintiff has also produced as Exhibits P/12 and P/13 the letters addressed by him to the Manager, National Saving Center, showing that the investments made by him in the shape of Saving Certificates in his own name as well as in the names of his wife and son, were sold by him. The contention of the learned counsel for the defendant that the plaintiff did not have sufficient amount in his bank account at the relevant time, has not impressed me. The obligation of the plaintiff was to pay the balance sale consideration to the defendant, and not to

retain the same in his bank account. It is not necessary or obligatory that a vendee must always have the amount of the sale consideration in his bank account till the sale is completed. The vendee can fulfill his obligation by arranging the sale consideration through other sources, as has been done in this case by the plaintiff by selling his plot and liquidating his securities. By requesting the defendant time and again to complete the sale, by issuing legal notices to her, and by selling his plot and liquidating his investments in order to arrange the balance sale consideration, the plaintiff has established his willingness and bonafides to perform his agreed part of the contract. The fact that the entire balance sale consideration of Rs.2,700,000.00 was deposited by the plaintiff with the Nazir in April 2004, cannot be ignored. This not only shows that the plaintiff was ready and willing to fulfill his obligation, but it also belies the assertion made by the defendant that the plaintiff did not have sufficient funds.

19. The defendant has alleged that the plaintiff himself had asked the defendant prior to the expiration of 90 days mentioned in the Agreement in the presence of witnesses, to cancel the Agreement and for the return of the advance part payment of Rs.300,000.00. In support of this contention, the defendant has examined three witnesses ; namely, her husband / attorney, Kamran Musharaf and Qadir Ahmed. The husband / attorney of the defendant has admitted in his cross examination that he did not mention in his affidavit-in-evidence about his presence on the relevant date and at the relevant time when the plaintiff allegedly visited the defendant's house and requested the defendant to cancel the Agreement and to return the advance part payment. This admission by the main witness / husband of the defendant creates a serious doubt about his alleged presence at the time of the alleged meeting and about his personal knowledge regarding the plaintiff's alleged request for cancellation of the Agreement. The second witness Kamran Musharaf is the son-in-law of the defendant. In his cross examination, he has stated that he did not remember the time, day, date and year when the plaintiff came to the house of the defendant. More importantly, he has admitted that the Agreement in respect of the suit property between the plaintiff and the defendant was not in his knowledge. These admissions by the son-in-law of the defendant also create serious doubt about the assertion made by the defendant, as it is hard to believe that her son-in-law was unaware of the Agreement for sale of the suit property. As far as the third witness Qadir Ahmed is concerned, his evidence also does not support the assertion made by the defendant. The burden to prove the assertion that the plaintiff had asked the defendant to cancel the

Agreement and to return the advance part payment, lay heavily on the defendant. In paragraph 6 of her written statement, it was averred by the defendant that the plaintiff had agreed that the advance part payment made by him will stand forfeited in case the balance sale consideration was not paid by him within time. Despite the fact that this assertion was important and material from the defendant's point of view, none of her witnesses led any evidence in support of this assertion. In view of the above admissions and statements by her witnesses, the defendant has not been able to discharge the burden or to prove the assertions made by her regarding the plaintiff's request for cancellation of the Agreement and/or for the return of the advance part payment.

20. It is an admitted position that the defendant never issued any written demand or notice to the plaintiff calling upon him to pay the balance agreed sale consideration, and that the advance part payment made by the plaintiff is still lying with the defendant. It is also an admitted position that the defendant did not issue any written notice to the plaintiff for cancellation of the Agreement. In this context, I would like to refer to the following two cases relied upon by the learned counsel for the plaintiff :

In Noor Muhammad (supra), it was held *inter alia* by this Court that it is an established principle that where time is provided for the performance of a contract in relation to an immovable property, it is not to be regarded as essence of the contract unless the parties with mutual consent make time as essence of the contract ; it is also a legal principle that where the parties make time as essence of the contract, but from the conduct of the parties or other stipulation of the agreement it becomes evident that time is not meant to be made essence of the contract, it is not to be regarded as time was the essence of the contract ; where time was clearly specified in one clause of the agreement, but the other clause provided that time could be extended, the effect of the former clause specifying the time would be nullified and time will not be regarded to have been made essence of the contract ; in view of the law laid down by the Hon'ble Supreme Court in PLD 1962 SC 01, when agreement is in relation to an immovable property, the agreement does not come to an end upon the expiry of the time for the performance ; and that the seller is required to serve a notice of at least 30 days to the purchaser calling upon him to complete the transaction, and after service of such notice, if the purchaser still fails to come forward and complete the transaction

within 30 days period, only then the contract for specific performance comes to an end and the purchaser becomes disentitled to seek specific performance.

In Faheem Ahmed (supra), it was held *inter alia* by this Court that in the contracts where time is of the essence of the contract and the seller fails to perform his obligations within the stipulated time, the buyer has the option either to sue the seller for damages in lieu of the performance of the contract or may seek specific performance of the contract and also claim damages in addition to the relief of specific performance ; this course is to be taken by a buyer only when the time is the essence of the contract ; where time is not the essence of the contract and the seller fails to perform his part within the stipulated time then the buyer has to first serve a notice upon the seller calling upon him to perform the contract within a reasonable time ; if the seller still fails to perform, then the buyer may either put an end to the contract, seek damages in lieu thereof or may seek the relief of specific performance of the contract as well as damages in addition to the relief of specific performance ; and that the difference between the two kinds of contract is that in cases where time is not the essence of the contract, the contract cannot be unilaterally put to an end by any of the contracting parties without first serving a notice and giving reasonable time to the other side for its performance.

21. As observed earlier, the plaintiff has established his willingness to perform his agreed part of the contract within the time stipulated in the Agreement. The evidence on record shows that it was the defendant who kept on avoiding to complete the sale, and finally she refused to do so by taking the plea that the time mentioned in the Agreement was of the essence of the contract, and that the plaintiff did not pay the balance sale consideration within time. In the case of Zaheer Ahmed (supra), the Hon'ble Supreme Court was pleased to hold that the party guilty of preventing the completion of the transaction within time cannot plead that time was the essence of the contract. In the case of Muhammad Ayyub Khan (supra), a learned Division Bench of the Lahore High Court was pleased to hold *inter alia* that mere mention of the period for completion of sale does not make the time essence of the contract, and presumption would be that the parties intended to perform the Agreement within a reasonable time. It was also held that the agreement cannot be revoked unilaterally. In Messrs Pioneer Housing Society (Pvt.) Limited (supra),

it was held *inter alia* by a learned Division Bench of the Lahore High Court that in the matter of agreements pertaining to immovable property, the time is ordinarily not the essence of the agreement, and if the parties desire that strict adherence to the time should be ensured, then the terms of the agreement should be so specific that would leave no room of doubt that any deviation from the time clause would entail penal consequences. Similarly in the case of Mst. Shehar Bano (supra), it was held *inter alia* by this Court that mere stipulation of a specific time in the contract for its performance would not necessarily mean that time was of the essence of contract, and that the contention of the defendant that the contract stood cancelled for non-performance of his part of the contract by the plaintiff within the stipulated period, was not tenable. It was further held that intention to make time essence of the contract must be expressed in unmistakable language or it may be inferred from what passed between the parties before, but not after the contract is made. The same principle was held by this Court and the Lahore High Court in the cases of ISSO (supra) and Anjuman-e-Islamia, Sialkot (supra).

22. Regarding the admission by the defendant that she had executed the agreement in favour of the plaintiff and had also received 10% amount of the agreed sale consideration from the plaintiff, I would like to refer to the cases of Inayat Ali and others (supra) and Muhammad Ayub through L.Rs. and others (supra). In both these cases, the suits for specific performance filed by the vendees were decreed as the vendors had admitted the execution of the agreements for sale in favour of the vendees and having received amounts from the vendees in pursuance of such agreements. No evidence was found that the sale agreements were executed with an intention other than the one disclosed therein. In Saleem Akhtar (supra), it was held by the Lahore High Court that it is a settled principle of law that the oral evidence cannot exclude the documentary evidence, and that a document can be rebutted only by a document. In Seth Essabhoj (supra), it was held *inter alia* by the learned Full Bench of the Hon'ble Supreme Court that in cases where the defendants themselves have committed breach of the contract, it is not obligatory on the complainant (plaintiff) in a suit for specific performance to prove his willingness to perform it up to the date of the filing of the suit.

23. Now I shall discuss the cases cited and relied upon by the learned counsel for the defendant. In Abdul Sattar (supra), which was merely a leave granting order of the honourable Supreme Court, the question for consideration was as to whether the agreement was an agreement to sale or a mortgage by

way of a conditional sale. In Federation of Pakistan (supra), the questions of breach of contract and calculation of damages were discussed by the learned Division Bench of Lahore High Court. The case of Mir Hashmat Ali (supra) has no nexus with the present case, as it was in respect of grant or refusal of specific performance of a contract relating to the Foreign Exchange Regulations in Pakistan, which were held to be of vital consequence to modern States. However, it was held *inter alia* by a learned Division Bench of the Dacca High Court in the cited case that specific performance is granted or refused on consideration of equity and not merely on the terms of the contract, which supports the case of the plaintiff. In Ahmad Bakhsh (supra), the readiness and willingness of the vendee / plaintiff was found to be missing. As I have already held that the plaintiff has established his willingness, the above Single Bench case will not be applicable, which even otherwise is not binding on me. With due respect, the cases relied upon by the learned counsel for the defendant are not relevant to the facts and circumstances of this case.

24. The overall effect of the above discussion is that, execution of the Agreement and receipt of 10% amount of the agreed sale consideration by the defendant is admitted by her ; admittedly, the defendant never issued any written demand or notice to the plaintiff calling upon him to pay the balance sale consideration, nor did she issued any notice for cancellation of the Agreement or for forfeiture of the advance part payment ; and the defendant has not been able to prove that that there was any delay or breach on the part of the plaintiff, or that he asked for termination of the Agreement. On the contrary, the plaintiff has established his willingness to perform his agreed part of the contract within the time specified in the Agreement, although in cases of immovable properties, time is not of the essence of the contract even if it is mentioned therein. There is no contradiction on this point in his plaint and evidence, and his stand has all along remained the same. The evidence produced by the plaintiff in order to show that he was ready to pay the balance sale consideration, has remained unshaken. Issue No.1 is, therefore, answered by holding that there was a breach of the Agreement, and that the breach was committed by the defendant.

ISSUE No. 2 :

25. The Agreement was/is a concluded contract between the parties, and such the same is capable of specific performance. In view of the finding on issue No.1, it is held that the plaintiff is entitled to the specific performance of the Agreement.

ISSUE No. 3 :

26. This issue relates to the damages claimed by the plaintiff from the defendant to the tune of Rs.600,000.00 on account of the loss allegedly suffered by him in the sale of his Plot No. A-100. The burden to prove this issue was on the plaintiff. In his evidence, the plaintiff has produced as Exhibit P/6-1 the agreement of sale signed by him and the transfer order in his name in respect of the said plot. The plaintiff has not produced any evidence to show that the actual market value of the said plot was higher than the price at which the same was sold by him. In the absence of any such evidence, it cannot be assumed that the said plot was sold by the plaintiff at a price which was less than the price prevailing at the relevant time, or that the plaintiff suffered loss in the said transaction. As the plaintiff has not been able to prove this issue, this issue is decided in the negative.

ISSUE No. 4 :

27. This issue is “*Whether the defendant committed default of court order (!) dated 2.10.03 and 6.4.04 ?*”. The burden to prove this issue was also on the plaintiff. The defendant’s husband / attorney / main witness was confronted in his cross examination by the learned counsel for the plaintiff with the suggestion that half portion of the suit property had been rented out by the defendant in spite of the order passed by this Court. This suggestion was specifically denied by the witness. Except for this suggestion, the witness was not confronted with any other question or material document. Moreover, the plaintiff did not produce any proof to show that the orders passed by this Court were violated by the defendant. This issue is also answered in the negative.

28. Before dealing with the last issue and before parting with this case, I would like to deal with the objection raised on behalf of the plaintiff regarding the Special Power of Attorney (Exh. DW-1) executed by the defendant in favour of her husband. The learned counsel for the plaintiff submitted that the defendant’s husband / attorney had no power or authority to give evidence on behalf of the defendant, as the Special Power of Attorney (Exh. DW-1) produced by him did not authorize him to do so, and as such the entire evidence given by the defendant’s husband / attorney is liable to be discarded and ignored. In support of this submission, the learned counsel relied upon *Inayatullah V/S Muhammad Aslam Khan and 2 others V/S Muhammad Aslam Khan and 2 others, 1975 SCMR 314,* and *Messrs Eagle Star Insurance Co. Ltd. V/s Messrs Usman Sons Ltd. and others, PLD 1969 Karachi 123.* With respect to the learned counsel, none of the above cases are applicable in the present case. In both the cited cases, the authority / power of the attorney was called in question as the attorney had entered into transactions in respect of

immovable properties belonging to the principal without the specific authority of the principal. There is no such situation in the present case, as the defendant had authorized her husband through Exhibit DW-1 *inter alia* to do and perform all things, deeds and acts in respect of the suit property in the present suit.

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29. This issue relates to the relief / decree. I have held that there was a breach of the Agreement and that the breach was committed by the defendant. I have further held that the plaintiff is entitled to the specific performance of the Agreement. The plaintiff is not entitled to the amount of Rs.600,000.00 claimed by him in prayer (iv) as damages in view of my findings on Issue No. 3. Prayer (v), wherein the plaintiff has prayed for a decree against the defendant for an amount at the rate of Rs.33,500.00 per month from the date of the suit till the possession of the suit property is handed over to the plaintiff, and also for a decree in the sum of Rs.500,000.00 as damages, cannot be granted to him, as no Issue was framed in respect of any of the above claims nor any evidence was produced in support thereof by the plaintiff.

30. In view of the above discussion, the Suit is decreed against the defendant by directing her to execute the Sale Deed in respect of the suit property in favour of the plaintiff and to hand over all the original title documents and the vacant and peaceful possession thereof to the plaintiff before the Sub-Registrar concerned in the presence of the Nazir of this Court within thirty (30) days. The defendant shall be responsible to settle / clear all the outstanding taxes, charges, bills, cesses, etc., in respect of the suit property till the date of the execution of the sale deed in favour of the plaintiff.

In case the defendant fails to execute the Sale Deed in favour of the plaintiff within the stipulated period, the Nazir shall execute the same in favour of the plaintiff. In such an event, all the outstanding taxes, charges, bills, cesses, etc. shall be paid by the Nazir out of the amount deposited by the plaintiff.

J U D G E