IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1040 of 2009

Nasir Ali v. Syed Qamar Hussain through his Legal Heirs

Plaintiff	:	Nasir Ali, through Mr Mohammad Safdar, Advocate
Defendant	:	Mst Iffat and Others, through Munawar Ali, Advocate
Dates of Hearing	:	05.05.2023, 18.05.2023, 23.05.2023, 24.05.2023, 29.05.2023
Date of Decision	:	26.08.2023

J U D G M E N T

Jawad Akbar Sarwana, J.: On 22.07.2009, Plaintiff, Nasir Ali, filed this suit for Specific Performance, Damages and Permanent Injunction against Defendant Syed Qamar Hussain. On 11.02.2015, Syed Qamar Hussain passed away. Pursuant to the Court's Orders dated 18.05.2015 and 03.02.2021, Defendant's legal heirs, the only surviving widow, Mst Iffat, and three daughters of Defendant from his three marriages, Mst Shahnaz, Mst. Shaheen, and Mst Shumaila, were brought on record, and Plaintiff's Counsel filed an amended title of the Plaint. For convenience, reference in this Judgment to the Defendant and/or his legal heirs, shall be made by reference to Syed Qamar Hussain. The Plaintiff prayed for the following reliefs against Syed Qamar Hussain:

i. To direct the Defendant to perform his part of contract specifically to execute the sale deed/conveyance deed and transfer the suit property/plots bearing Nos.R-724-725, Sector 1-A, KDA, Scheme No.35, Lines Area, Gulshan-e-Zahoor, Karachi, measuring on/or about 90 Sq. Yards in favour of the Plaintiff, in case the Defendant fails to perform his contractual obligations the Nazir of this Court may be directed to perform contractual obligations on his behalf for execution of the sale deed/conveyance deed in favour of Plaintiff.

ii. To pass a decree against the Defendant for an amount of Rs. 20,00,000/- (Rupees Twenty Lac Only) as a damages.

iii. To permanently restrain the Defendant, his representatives, agents, attorneys, servants or any other persons claiming/acting on his behalf from creating, transferring , alienating, parting with possession, creating third party interest, and/or disposing off the suit property/Plots

bearing Nos.R-724-725, Sector 1-A, KDA, Scheme No.35, Lines Area, Gulshan-e-Zahoor, Karachi, measuring on/or about 90 Sq.Yards or any part thereof in any manner whatsoever and/or entertaining into sale transaction with any person(s) except the plaintiff.

iv. Grant any other relief/reliefs, which this Honourable Court may deem fit and proper in the circumstances of the case.

v. Cost of the suit.

2. The brief facts of the case are that on 24.05.2005, Plaintiff, Nasir Ali, agreed to a sale transaction with Defendant Syed Qamar Hussain in respect of a double-storied bungalow on plot bearing no.R-724, Section 1-A, KDA, Scheme No.35, Lines Area, Gulshan -e- Zahoor, Karachi, ad-measuring 90 sq. yards (hereinafter referred to as "the suit property"). Plaintiff paid in cash to Defendant a sum of Rs.100,000 towards advance/part payment of the sale price and obtained receipt of the same from the latter. According to the sale receipt printed on a Rs.50/- stamp paper (with the basic terms of sale stated in Urdu language), the sale price agreed between the parties was Rs.2,150,000. The advance/part payment of Rs.100,000 was described as non-refundable. In case Defendant did not hand over the property to Plaintiff within two months, Defendant would refund double the amount to Plaintiff. Plaintiff would pay the Defendant within two months the balance of Rs.2,050,000. Within this period of two months, Defendant, as the title-owner of the suit property, will be paid Rs.1,000,000. The total balance payment would be paid in two months and Plaintiff would be handed over possession of the suit property. Defendant agreed to arrange the sale deed. Thereafter, parties executed an "Agreement to Sell dated 15.06.2005" on 24.06.2005 in respect of the suit property, the relevant features of which were as follows:

> "Clause 1. That the **VENDOR** has already received a sum of **RS. 1,00,000/- (RUPEES ONE LAC ONLY**), from the said **VENDEE**, on Dated **24-05-2005**, by way of advance/token amount in respect of the aforesaid Property and the **VENDOR** further will be received a sum of **RS.10,50,000/- (RUPEES TEN LACS & FIFTY THOUSAND ONLY)**, by two pay order (i) Rs. Amount PKR 650,000/- P.O.#1085104, / 2918829 /2005 16, Date:23–June 2005, No.(ii) Amount PKR 400,000/- P.O. # 1085103, / 2918828/2005 94 Date:23-06-2005, Bank Al-Habib Limited."
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> "Clause 2. That the remaining/balance/rest amount of **RS.10,00,000/- (RUPEES TEN LACS ONLY)**, shall be paid by the **VENDEE** to the **VENDOR**, commencing from execution and signing of proper **Sale Deed**, before the Sub-Registrar concerned to the **VENDEE** above named."

> "Clause 5. That the Vendor hereby declare that the said Property or any part/Property thereof is free from all claims, liens, charges & encumbrances of whatsoever nature and in the event of any adverse title, claims, set up by any person(s) or any family member, at any time, the Vendor hereby undertake to indemnify the VENDEE, against all claims, losses, demands and damages caused and/or which may be caused to the Vendee."
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> "Clause 7. That if the Vendee fail to pay the balance amount of **Rs.10,00,000/-** the Vendor abovenamed within the stipulated period, the Vendor will be forfeited the aforesaid part payment of **Rs.1,00,000/-**, while the Vendor fail to deliver the vacant possession of the said Property, to the Vendee within the stipulated period, then who shall pay double amounts of the part payment of **Rs.2,00,000/-** to the Vendee above named."
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> "Clause 9. That the **VENDOR** hereby declares that the said Property or any part/Property thereof is free from all encumbrances of whatsoever nature and in the event any claim or objection in future by any person or persons the Vendor agrees to remove the objection on the said Property.
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> "Clause 10. That this agreement of IRREVOCABLE and the time prescribed above for completion of the transaction is the essence of this contract."

3. On 23.06.2005, Plaintiff paid Defendant a further sum of Rs.1,050,000 through two Pay Orders of Rs.400,000 and Rs.650,000. Meanwhile, Defendant handed over to Plaintiff possession of the first floor of the bungalow on the suit property, and neither Plaintiff paid the balance payment to Defendant nor Defendant arranged Sale Deed within the stipulated period. Plaintiff apparently continued to approach Defendant for the execution of the sale deed without success until November 2006, when Defendant allegedly asked Plaintiff for a higher price. During this period, the Plaintiff also approached the Nazim / Union Council to resolve the dispute without luck. At some point between 2005 and 2009, Plaintiff visited Defendant's brother, who worked at a bank, to find out the status of the suit property when Plaintiff was informed that the suit property was mortgaged with Habib Bank Limited. Defendant claimed that Plaintiff knew that the suit property was mortgaged and that Plaintiff was required to pay the loan amount to the bank as part of the sale transaction but did not make any payment. The Plaintiff submitted that he had possession of the First and Second Floors of the Bungalow, and the Defendant and his daughter continued to occupy the Bungalow's Ground Floor. The Plaintiff claimed that the daughter was a tenant. On 22.07.2009, Plaintiff filed the titled suit against Defendant, praying for the reliefs as set out in paragraph 1 above.

4. On 05.04.2010, the trial Court passed Orders retraining the creation of any third-party interest over the suit property subject to the deposit of the balance sale consideration by Plaintiff and that such deposit would be without prejudice to Defendant's rights and interest/defence. The Court also flagged the question of limitation in the suit in the said Order.

5. On 19.01.2021, during final arguments, the Court ordered Defendant's Counsel to seek clear instructions from L.R.'s of Defendant regarding the status of the mortgage over the suit property. Accordingly, Defendant's Counsel submitted a Statement along with a letter dated 04.11.2021 of Karachi Development Authority ("KDA") wherein the Deputy Director (C&S) Lines Area Re-Development Project, KDA Scheme 35, confirmed that ownership/title of the suit property rested with the Defendant and that a mortgage/assign had been issued as of 04.04.1984 which was still in force and no redemption deed or bank clearance letter was available in the concerned file of the plot. As the name of the bank was not specified in KDA's letter, based on Plaintiff's submission that during evidence, it was mentioned that the mortgage exists with HBL Bank Ltd., the Court issued notices to Habib Bank Limited in order to "confirm whether subject property is available with the said Bank under mortgage and if so what charge is available in this respect." No further orders or developments in this regard are found in the suit file.

6. Defendant, Syed Qamar Hussain, filed his Written Statement on 27.04.2010. He claimed that the Plaintiff's suit was not maintainable under the law. He contended that after two months of the sale transaction, while Defendant was ready to execute the sale deed in favour of Plaintiff, the latter avoided payment of the balance sale consideration. Defendant submitted that it was orally mutually agreed between the parties that Plaintiff would pay the loan amount over the suit property to the bank and get the title documents released at his expense. Defendant added that the market value had considerably escalated, and Plaintiff had yet to make any payment to Defendant. Defendant conceded he had given Plaintiff possession of only the First Floor but Plaintiff had broke open the lock and let out the Second Floor to some tenant. Defendant claimed unpaid rent of Rs.10,000 per month from Plaintiff.[1] Lastly Defendant stated that he was the lawful and absolute owner of the suit property and the Plaint should be dismissed.

[1] Although Defendant claimed unpaid rent, he neither filed any counter-claim nor paid court fee nor Court drafted any issue on this point.

7. With the consent of the learned Counsels for the parties, the Court settled the following issues on 13.12.2010:

(i) Whether the Plaintiff is entitled to a specific performance of the agreement?

(ii) Whether the Defendant at the time of entering into sale agreement assured that the suit property is free from all claims, lien, charge and encumbrances, if so, what its effect?

(iii) Whether the Defendant at the time of entering into sale transaction disclosed that the suit property is mortgaged with the bank and the Plaintiff was agreed to pay of such liabilities, if so, what its effect?

(iv) Whether the Plaintiff is entitled for the decree as prayed?

(v) Whether the Plaintiff is entitled for Damages?

(vi) What should the decree be?

8. On 25.02.2013, the Court appointed a Commissioner for Recording of Evidence. On 01.06.2013, Yasir Ali son of Plaintiff appeared as an attorney and witness of the Plaintiff. He filed his affidavit-in-evidence and was cross-examined on 07.12.2013. The Plaintiff's witness produced the Original Receipt dated 24.05.2005 (Exhibit "P/5"), the Original Agreement to Sell dated 15.06.2005 (Ex. "P/4") and other documents, including, but not limited to, Bank AL-Habib Limited MA Jinnah Road Branch, Karachi, Bank Statement of Plaintiff's son, Yasir Ali, for the period from 26.01.2005 to 31.12.2005. Syed Murtaza Hussain, brother of the Defendant, filed his affidavit-in-evidence on 25.01.2014 and was cross-examined on 22.03.2014. The Commissioner's Report dated 06.05.2014 was taken on record on 12.03.2018.

9. The learned counsel for Plaintiff submitted that Plaintiff had completed his part of the bargain, following the agreement with Defendant on 24.05.2005. Plaintiff had paid Defendant a sum of Rs.1,150,000 out of Rs.2,150,000, and a balance of Rs.1,000,000 was outstanding, subject to payment on registration of the sale deed. This never happened. The Defendant did not execute a sale deed. Plaintiff Counsel produced a copy of Plaintiff's son's (not Plaintiff's) statement of bank account as proof of the availability of funds to pay Defendant. He contended that Plaintiff took possession of the First Floor of the Bungalow but Defendant failed to complete the sale transaction. Counsel further contended that Defendant had misled Plaintiff as he later found out that the suit property was

mortgaged to a bank. This was contrary to the terms of the "Agreement to Sell dated 15.06.2005", wherein Defendant had given clear assurance that the suit property was free from encumbrances and liens. He argued that the "Agreement to Sell dated 15.06.2005" did not mention the completion date of execution/registration of the sale deed. On his part, the Plaintiff had also deposited the balance sum of Rs.1,000,000 with Nazir. In the circumstances under Article 113 of the Limitation Act 1908, the period of limitation for specific performance of a contract was three years from the date fixed for the performance or if no such date is fixed when the Plaintiff has notice that performance is refused. Plaintiff argued that no date was fixed in the contract. The sale receipt was not a contract but merely a receipt. Further, the only reference to the said receipt in the "Agreement to Sell dated 15.06.2005" was in the forfeiture clause. Therefore, the two-month period to make payment was in relation to the forfeiture clause and not the sale price. Thus, only the advance/token payment of Rs.100,000 would stand forfeited after two months. The period of limitation commenced when Defendant refused performance of the contract and this was in the year 2009. Plaintiff was always ready to perform but Defendant avoided execution of the Sale Deed. As such, the contract was in force and the suit was filed within time. Plaintiff's Counsel placed reliance on several reported cases which are referenced herein.

10. The Defendant's Counsel claimed that the Receipt dated 03.05.2005 clearly stipulated a period of two months to complete the sale transaction. The Defendant had disclosed to Plaintiff that the suit property was mortgaged, and he had to make payment to get the property released. A sale deed could only be executed thereafter. Defendant Witness acknowledged that there was no reference to the suit property being mortgaged in any of the documents executed between the parties, i.e. neither in the "Advance/Token Receipt" nor in the "Agreement to Sell dated 15.06.2005". While the "Agreement to Sell dated 15.06.2005" referred to the receipt of payment, admittedly did not clearly mention the Receipt", he contended that the sale transaction comprised of the "Advance/Token Receipt" and the "Agreement to Sell dated 15.06.2005". Both were admitted documents and had to be read together. Therefore, the reference to "stipulated time" has to be read in the context of the entire sale transaction and not simply the forfeiture clause in the "Agreement to Sell". Finally, the penultimate paragraph of the Agreement to Sell stated that "time was of the essence." He contended that the reference to time being of essence could only be a reference to the two-month period of time stipulated in the "Advance/Token Receipt". Plaintiff did not complete the payment schedule with Defendant within the stipulated time of two (2) months. He did not write to the

Defendant when he would make the payment. Instead, he simply waited and bought time and did not call upon the Defendant to execute the Sale Deed. The Counsel argued that the Defendant had daughters living in the house and he was the only male in the family. He added that when Defendant would ask Plaintiff to make the balance payment, Plaintiff would use filthy language and did not make any payment. Counsel argued that Plaintiff allowed the price to appreciate. The sale price of the suit property kept increasing and no payment was received from Plaintiff. Thus, as time was of the essence when the Plaintiff filed the suit, the same was already time-barred under Article 113 of the Limitation Act, 1908. Counsel admitted that Plaintiff was in possession of the First Floor of the Bungalow, but this was because Plaintiff expected the balance payment. Counsel argued that Plaintiff forcibly occupied the Third Floor of the suit property bungalow by breaking open Plaintiff's lock. He claimed that Plaintiff unauthorizedly put up the third floor of the suit property for rent. He submitted that the suit for specific performance was not maintainable and should be dismissed. He cited several authorities in support of his arguments which are referred to herein.

11. I have heard the learned Counsels for parties, read the material/evidence available on the record, and considered the applicable law, and my findings on the above issues, along with reasons, are as follows:

REASONS

Issue No. (i)

12. Issue no. (i) requires the Court to examine whether the Plaintiff is entitled to a specific performance of the agreement. The core ingredient in this issue is what constitutes "the agreement". The Plaintiff's witness produced the originals of "Advance/Token Receipt" dated 25.05.2005 (Ex. "P/5") and "Agreement to Sell dated 15.06.2005" executed on 24.06.2005 (Ex. "P/4"). Witnesses neither denied the document nor the contents of both exhibits. Parties acknowledged in Clause 1 of the Agreement that Defendant, had received a sum of Rs.100,000 on 24.05.2005. There is/was no direct reference to the "Advance/Token Receipt" in the Agreement. At the same time, there is no clause in the Agreement that states that the terms and conditions of the "Advance/Token Receipt" have not been incorporated in the Agreement.

13. According to the plain reading of the "Advance/Token Receipt"(Ex. "P/5"), it is apparent that the parties incorporated all the major terms and conditions of sale in the "Advance/Token Receipt". These items included sale price, payment terms, payment schedule, possession and payment of final

instalment and arranging sale deed. To this end, Plaintiff and Defendant agreed to the sale price of Rs.2,150,000. Next, they agreed to a non-refundable advance/token of Rs.100,000. In case, Defendant did not hand over possession to Plaintiff within two months, the non-refundable token would double in amount. During these two months, Plaintiff promised to pay Defendant another Rs.1,000,000. The balance sale amount would also be paid in two months. Finally, they undertook to jointly complete sale deed.

14. According to the evidence brought on record, by the time Plaintiff and Defendant executed the "Agreement to Sell dated 15.06.2005" executed on 24.05.2005 (Ex. P/4"), Defendant had handed to Plaintiff part-possession of the suit property well within the stipulated period of two months mentioned in the "Advance/Token Receipt". Plaintiff's witness admitted as follows in his cross-examination:

> "I see the receipt Ex. P/5 and say that the sale agreement was between the plaintiff and defendant and the period was fixed for execution by two months from 24.05.2005 to 27.07.2005. It is correct that the possession was to be handed over after full payment within two months. I see the agreement dated 15.06.2005 Ex. P/4 and say that it is not correct to suggest that the possession of the suit property was not delivered to the plaintiff as of 15.06.2005."
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> "It is not correct to suggest that the defendants had given possession of 1st floor only on part payment. Volt; states that possession of the entire property was given."
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> "It is correct that the ground floor is occupied by the daughter of the defendant Mst. Shaine."

15. In the cross-examination of Defendant's witness, Defandant's brother deposed as follows:

> "It is not correct to suggest that the defendant, after signing the sale agreement, delivered the possession of ground and 1st floor to the plaintiff. It is not correct to suggest that the daughter of the defendant entered into rent agreement with the plaintiff on 01.09.2005, Ex. P/7 in respect of the ground floor.

16. The evidence shows that Plaintiff was given part possession of the suit property within two months of the execution of the "Advance/Token Receipt" dated 24.05.2005. Thus it is common ground that Plaintiff had possession of the First Floor of the bungalow on the suit property within the stipulated period of two months mentioned in the "Advance/Token Receipt." There was no rush to give hand over part-possession to Plaintiff, but for the stipulated period of two months mentioned in the "Advance/Token Receipt."

17. On 15.06.2005, the parties signed an “Agreement to Sell”. Thereafter, Plaintiff performed his part of the bargain as set out in the “Advance/Token Receipt” i.e. the payment of Rs.1,050,000/- within the two months stipulated period. The two a/c payee pay orders dated 23.06.2023 were drawn on Bank AL-Habib Limited in the sum of Rs.650,000/- (Ex. “P/6”) and Rs.400,000 (Ex. “P/7”) payable to the Defendant. The pay orders evidenced that the pay orders were prepared from Plaintiff’s son’s (Yasir Ali’s) bank account in Bank AL Habib Limited. The Plaintiff did not make payment to Defendant directly from his bank account. The Defendant’s witness acknowledged this payment being within the stipulated time period as follows in his cross-examination:

> “It is correct that according to receipt Ex.P/5, a period of two months are fixed for completion of the sale transaction and payment of the balance sale consideration. It is correct that according to receipt Ex.P/5, the balance sale consideration of Rs.20,50,000/- was to be paid within two months. It is correct that out of the amount of balance sale consideration of Rs.20,50,000/- the Plaintiff was required to pay to the Defendant a sum of Rs.10,00,000/- between two months. It is correct that the Plaintiff by Pay Order Ex.P/6 and P/7, paid the amount of Rs.10,00,000/- on 23.06.2005. It is correct that the agreement of sale was signed on 24.06.2005.”

18. Consequently, evidence shows, once again, that Plaintiff had made about 50% of the payment to Defendant well within the stipulated period of two months. Further, as per the “Advance/Token Receipt” dated 24.05.2005, parties had completed their obligations relating to advance/token, forfeiture, schedule of payment, actual payments and possession within the agreed stipulated period of two months. With regard to the remaining balance payment and sale deed, the language of the “Advance/Token Receipt” is reproduced in Roman English as follows:

> “. . .ess dou maah kay darmi-yaan Rs.1,000,000 duss lac Nasir Ali malik-e-makan ko adaa karay gaa. Baaqi ra-kam ki dou maah may ada-ee-gii ho gii, aur makan kabza diya jaa-aye ga. Sale deed karh-a-kurh doon gaa.”

19. Therefore, at all times, in so far as the “Advance/Token Receipt”, was concerned, the stipulated period of the sale transaction was two months. However, when parties executed the “Agreement to Sell dated 15.06.2005” on 24.06.2005, there was no direct reference to the terms and conditions stated in the “Advance/Token Receipt.” except for indirect references to certain items in Clauses 1, 2, 7 and 10, which were mentioned in the “Advance/Token Receipt. Clause 1 of “Agreement to Sell dated 15.06.2003” referred to the receipt of

Advance/Token amount but did not mention either the receipt or the terms and conditions thereof. By the same token, Clause 2 of the agreement mentioned for the first time that the remaining/balance/rest amount of Rs.1,000,000 shall be paid by Plaintiff to Defendant commencing from execution and signing of proper Sale Deed before the Sub-Registrar. With the introduction of the word: "commencing", the clause appeared to suggest that there may be a schedule for payment commencing after the execution and signing of the proper Sale Deed. No evidence was led on this point. Clause 7 stated that if Plaintiff failed to pay the balance amount of Rs.1,000.000 to Defendant within the stipulated period, the sum of Rs.100,000 would stand forfeited. Conversely, if Defendant failed to handover vacant possession to Plaintiff within the stipulated period, then Defendant would have to pay double the amount of Rs.100,000. Finally, Clause 10 added that the time prescribed for completion of the transaction is the essence of this contract. Neither Counsels argued novation of contract nor alleged that the later in time "Agreement to Sell" substituted the terms and conditions of the earlier in time "Advance/Token Receipt". Both Counsels contended that the two documents had to be read together. Plaintiff submitted that the reference to the stipulated period in the "Agreement to Sell" was merely to the forfeiture clause and nothing else. He contended that no date was fixed and the period of limitation would commence when Plaintiff had notice from Defendant refusing performance. Defendant had issued no such refusal of performance. Plaintiff Counsel's contentions do not inspire confidence. While Clause 7 refers to the forfeiture amount, the same clause mentions that the balance payment of Rs.1,000,000 is to be made within the stipulated period. The clause also mentions that vacant possession of the suit property has to be made within the stipulated period. For all the reasons mentioned herein above, I am of the view that the date fixed for the performance of the contract between Plaintiff and Defendant was two months which expired in July 2005, when neither Defendant handed over complete vacant possession of the suit property to Plaintiff nor Plaintiff paid the balance sale consideration to Defendant nor Defendant arranged to execute the Sale Deed.

20. Under Article 113 of the Limitation Act, a suit for specific performance of contract is to be brought within three years from "the date fixed for the performance, or if no such date is fixed, when Plaintiff has noticed that performance is refused". The period of limitation under Article 113 shall commence forthwith from the date fixed by the parties, irrespective of the alleged failure, inabilities of the Defendant to perform its part of the obligations, the alleged subsequent communications and dealings between their parties, their conduct, etc. None of these factors have any relevance in the context of the

calculation of the period of limitation. In *Haji Abdul Karim and others v. Messrs. Florida Builders (Pvt.) Ltd.*, PLD 2012D, SC 247, the Supreme Court of Pakistan, held that:

> "Thus now the three years period mentioned in Column No. 3 of the Article runs in two parts:
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> (i) from the date fixed for the performance; or
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> (ii) where no such date is fixed when the plaintiff has notice that performance is refused.
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> The reason for the said change as stated above is obvious. In the first part, the date is certain, it is fixed by the parties, being conscious and aware of the mandate of law i.e. Article 113, with the intention that the time for the specific performance suit should run therefrom. And so the time shall run forthwith from that date, irrespective and notwithstanding there being a default, lapse or inability on part of either party to the contract to perform his/its obligation in relation thereto. The object and rationale of enforcing the first part is to exclude and eliminate the element of resolving the factual controversy which may arise in a case pertaining to the proof or otherwise of the notice of denial and the time thereof. In the second part, the date is not certain and so the date of refusal of the performance is the only basis for computation of time. These two parts of Article 113 are altogether independent and segregated in nature and are meant to cater two different sorts of specific performance claims, in relation to the limitation attracted to those. A case squarely falling within the ambit of the first part cannot be adjudged or considered on the touchstone of the second part, notwithstanding any set of facts mentioned in the plaint to bring the case within the purview of the later part. In other words, as has been held in the judgments reported as Siraj Din and others v. Mst. Khurshid Begum, and others (2007 SCMR 1792) and Ghulam Nabi and others v. Seth Muhammad Yaqub and others (PLD 1983 SC 344) "when the case falls within first clause the second clause is not to be resorted to". However, the exemption, the exclusion and the enlargement from/of the period of limitation in the cases of first part is permissible, but it is restricted only if there is a change in the date fixed by the parties or such date is dispensed with by them, but through an express agreement; by resorting to the novation of the agreement or through an acknowledgment within the purview of section 19 of the Act."

21. In the case at hand, the parties were to perform their respective parts of the contract within two months. Although the actual date of the calendar month was not mentioned, the "stipulated period" of two months may be calculated from the date of the "Advance/Token Receipt" signed on 24.05.2005. Therefore the action filed in this Court by the Plaintiff ought have been filed by 24.05.2008,

which it was not. Instead, the titled suit was filed on 22.07.2009, and hence it is hopelessly time-barred.

22. In *Abdul Ghani v. Muhammad Shafi and 4 Others*, 2007 SCMR 1186, the Supreme Court of Pakistan observed as follows:

> "It may be noted that time of one year was fixed in the agreement for completion of sale and in absence of any express stipulation in the mortgage deed regarding enlargement of time to complete the sale, it would not automatically extend and even in case of implied intention to extend the time, the sale must have been completed within reasonable time. The normal period provided for filing of the suit for specific performance of contract provided under Article 113 of the Limitation Act, 1908 is three years from the date of execution of the agreement and this statutory period of three years even if is considered to have commenced from the date of execution of mortgage deed or from the date of expiry of the agreement to sell the suit would still be time-barred and thus, the contention of the learned counsel that under second part of Article 113 of the Limitation Act, 1908, the time would be computed from the date of refusal of the performance of the contract, has no force."

23. Given that the stipulated time for the performance of the contract was two months, nothing was brought on record through evidence that such time was extended and/or enlarged viz. *Abdul Ghani* case (supra). There was no express term in the "Agreement to Sell" for registration of the sale deed to be executed beyond the stipulated period of two months fixed for its performance. In such circumstances, there was nothing available for Plaintiff to escape the bar of limitation. The suit filed was/is barred by time.

24. There is another aspect in the matter. Even if it is assumed that Plaintiff could overcome the bar of limitation which he has not, for the sake of argument, if this Court momentarily assumes that he had, even so, Plaintiff would fail to establish his case of decree for specific performance.

25. Section 22 of the Specific Relief Act, 1877, states as follows:

> "22. Discretion as to decreeing specific performance.---The jurisdiction to decree specific performance is discretionary, and. the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.
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> The following are cases in which the Court may properly exercise a discretion not to decree specific performance:

> I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.
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> II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas in non-performance would involve no such hardship on the plaintiff.
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> The following is a case in which the Court may properly exercise a discretion to decree specific performance:--
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> III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance."

26. A plain reading of Section 22 of the Specific Relief Act indicates that the relief of specific performance claimed by Plaintiff is purely discretionary in nature, and the Court is not bound to grant relief merely as it is lawful to do so. The discretion to be exercised by the Court should not be arbitrary and ought to be based on sound and reasonable analysis of the relevant facts of the case and the application of judicial principles. In *Liaquat Ali Khan and Others v. Falak Sher and others*, PLD 2014 SC 506, the Supreme Court made the following observations regarding discretionary powers of the Court when dealing with a case for specific performance:

> "A careful reading of these instances, which are self-explanatory, further amplify vast powers of the Court in the matter of exercise of its discretion for ordering specific performance or otherwise. When the above reproduced provision of law is read in conjunction with the case-law cited at the Bar by both the learned Senior Advocate Supreme Courts, the things as regards powers of the Court in exercising its discretion, become even more clear that there is no two plus two, equal to four formula available with any Court of law for this purpose, which can be applied through cut and paste device to all cases of such nature. Conversely, it will be the peculiar facts and circumstances of each case, particularly, the terms of the agreement between the parties, its language, their subsequent conduct and other surrounding circumstances, which will enable the Court to decide whether the discretion in terms of section 22 (ibid) ought to be exercised in favour of specific performance or not. . . ."

27. One of the discretion involved in a case for specific performance is laid down by the Supreme Court of Pakistan in *Samina Riffat and Others v. Rohail Asghar and Others*, 2021 SCMR 7. In the *Samina Riffat* case, the Supreme Court set up the raison d'etre for the vendee seeking specific performance to demonstrate his/her readiness and willingness to perform his/her part of reciprocal obligations as to payment of balance sale consideration as follows:

> “Generally, in respect of sale of immovable property, time is not considered as of the essence of the contract. However, parties may consciously strike a deal to make time essence of the contract by providing certain consequences for breach of reciprocal obligation casted upon them, in such cases, time is treated as essence of the contract[3.], In instant case, as could be noted that, where vendor backs out from the deal and avoid to execute conveyance deed, clause 5 of the agreement stipulated that "then they shall pay back the entire sale consideration already received from the purchaser along with an equal amount as compensation." Likewise for failure of the vendee to perform his part of the obligation in terms of clause 6 "in event he backs out from this deal or fails to pay the remaining consideration within prescribed period, then this deal will be considered canceled and the received earnest money will be forfeited". In terms of section 51 of the Contract Act (IX of 1872); where a contract is dependent on discharge or performance of reciprocal promise or obligations to be performed or discharged. The Promisor need not perform his part of promise or obligation, unless the promisee, (here in this case the vendee) "is ready and willing to perform his reciprocal promise." In cases arising out of sale of immovable property, a vendee seeking specific performance has to demonstrate his readiness and willingness to perform his part of reciprocal obligation as to payment of balance sale consideration. The question what is readiness and willingness to perform a contract was attended to by a learned division bench of the West Pakistan High Court (Karachi) in the case of Abdul Hamid v. Abbas Bhai-Abdul Hussain.[4] It was held[5] that "In the first place, willingness to perform ones contract in respect of purchase of property implies the capacity to pay the requisite sale consideration within the reasonable time. In the second place, even if he has the capacity to pay the sale consideration, the question still remains whether he has the intention to purchase the property. On consideration of all the facts it appears that the appellant was not in a position to pay the balance sale consideration. At any rate, the appellant was not willing, even if he had the capacity to pay the money, to have the sale deed completed.”

28. In *Nazar Hussain and another v. Syed Iqbal Ahmad Qadri (deceased) through his L.R.’s and Another*, 2022 SCMR 1216, the Supreme Court of Pakistan, further elaborated the concept of the buyer positively demonstrating his/her readiness and willingness of pay as follows:

> “5. A buyer's primary obligation in a contract of sale is to make payment of the balance sale consideration as stipulated in the contract. If the seller refuses to receive payment the buyer must establish that he had the required money which was kept aside for the seller, for instance, by making a pay order or cashier cheque in his name. This would show that the buyer no longer had access to the

> sale consideration. Alternatively, the buyer could have deposited it in court. The petitioners did neither. If a buyer does not fulfill his primary obligation to secure/tender the sale consideration and files suit, and does so without depositing the sale consideration in court, the buyer is placed in an advantageous position."

29. In the present case, Plaintiff miserably failed to show his readiness and willingness to pay the balance sale consideration. First, Plaintiff did not produce his personal statement of account during the evidence. Instead, he produced his son's bank statement through his son as his witness. The sale transaction in the suit property was between Plaintiff and Defendant and not between Plaintiff's son and Defendant. Yet Plaintiff did not produce his personal bank statement. Plaintiff's decision not to submit his bank statement does not inspire confidence regarding Plaintiff's ability to make payment and/or that he had sufficient funds to pay Defendant. Thus, while Plaintiff took part-possession over the suit property within the stipulated period of two months, Plaintiff did not pay the balance sale consideration out of his own funds within the same period, Secondly, according to the evidence, the payments of Rs.1,150,000 were, in fact, made from Plaintiff's son's account to Defendant. No evidence was brought on record to explain why this was so. Why did Plaintiff not pay the tranches from his funds between May and June 2005? Why did Plaintiff use his son's bank account to prepare several pay orders totaling Rs.1,150,000 payable to Defendant? Third, as mentioned in the *Nazar Hussain* case, even if it is assumed that Plaintiff had the funds on him (as opposed to his son having funds), Plaintiff failed to prove that he took any positive steps to pay the balance sale consideration. He did not produce any pay order or cashier's cheque in the name of Defendant in support of his status that he was truly ready and awaiting to make payment to Defendant. Fourth, Plaintiff did not, in the first instance, deposit the balance sale consideration on his own motion. He did not propose to deposit the outstanding balance amount immediately with the filing of the suit. This would have been yet another factor to show his bonafide of his willingness and readiness to pay the balance outstanding sale price. Yet, the balance outstanding sale price was paid pursuant to the Order of the Court on 27.04.2010. As per the principle laid down in the *Nazar Hussain* case, if a buyer does not fulfil his primary obligation to secure/tender the sale consideration and files suit and does so without depositing the sale consideration in Court, the buyer is placed in an advantageous position. Finally, it is admitted that Plaintiff never appeared in the witness box to substantiate his claims and prove his bonafide, particularly concerning intention and willingness to pay. Only the Plaintiff's son appeared as a witness. The Plaintiff's son was not a material witness. Only the Plaintiff could have been a material witness. The Plaintiff stepping into the witness box, subjecting himself

to cross-examination, and proving his willingness and readiness to pay the balance outstanding sale consideration, would have been helpful for the Plaintiff's cause, particularly as no documentary evidence was brought on record. But there was no such deposition by Plaintiff himself. Plaintiff has not been able to show from the evidence that before filing the suit, he made any effort to fulfil his part of the contract and offered payment of the sale price to Defendant within the stipulated time or alternatively within a reasonable time to complete the sale. Therefore, no claim of a decree for specific performance is made out notwithstanding that the suit is time-barred.

30. In view of the above, Issue No. (i) is answered in the negative for the reason that the suit is barred by limitation, as already mentioned in the foregoing paragraphs, and thus, the Suit is not maintainable. In the alternative, even if this Court had come to a different conclusion, that the suit was within time, then for all the reasons discussed above, the Plaintiff would also not have been entitled to a decree for specific performance. Thus issue no.(i) is decided in the negative and against Plaintiff.

Issue Nos. (ii) and (iii)

31. The issue nos. (ii) and (iii) are somewhat overlapping and hence are answered together. This is because issue no.(ii) concerns the determination of whether Defendant, at the time of entering into the sale agreement, assured Plaintiff that the suit property is free from all claims, lien, charge and encumbrances. The assurance concerns the consequence of Defendant's assurance and undertaking to Plaintiff that there was no lien over the suit property. Somewhat varied, issue no.(ii) assumes that Plaintiff had knowledge that there was a lien over the suit property and the consequence of such knowledge on the part of Plaintiff purchasing suit property knowing that was a lien. It may not be out of place to mention here that as issue no.(i) has been decided in the negative and the suit is time-barred, the discussion and outcome of this issue is somewhat academic.

32. Clauses 5 and 7 of the "Agreement to Sell dated 15.06.2005" signed on 24.06.2005, states as follows:

> "Clause 5. That the Vendor hereby declare that the said Property or any part/Property thereof is free from all claims, liens, charges & encumbrances of whatsoever nature and in the event of any adverse title, claims, set up by any person(s) or any family member, at any time, the Vendor hereby undertake to indemnify the VENDEE, against all

> claims, losses, demands and damages caused and/or which may be caused to the Vendee."
>
> "Clause 9. That the **VENDOR** hereby declares that the said Property or any part/Property thereof is free from all encumbrances of whatsoever nature and in the event any claim or objection in future by any person or persons the Vendor agrees to remove the objection on the said Property.

33. The Plaintiff and Defendant, in their pleadings as well as in the evidence, have admitted the contents of the "Agreement to Sell." They have not denied the said agreement. They may have different interpretations with regard to contents, in particular (and as discussed in issue no.(i)) regarding the meaning of "stipulated period", nevertheless, both parties accept the said Agreement.

34. It is pertinent to mention here that Article 102 of the Qanun e Shahadat Order, 1984 states as follows:

> "**102. Evidence of terms of contracts, grants and other disposition of property reduced to form of document:** When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> Exception 1: . . .
>
> Exception 2: . . .
>
> Explanation 1: This Article applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents that one.
>
> Explanation 2: Where there are more originals than one, one original only need be proved.
>
> Explanation 3: The statement, in any document whatever, of a fact other than the facts referred to in this Article, shall not preclude the admission of oral evidence as to the same fact. . . ."

35. Article 102 codifies a common law doctrine referred to as the "Parol Evidence Rule" which is a rule that preserves the integrity of a written document. The rule prohibits the parties from amending the meaning of the written document through the use of previous oral declarations that are not stated in the document itself. Similarly, if a party had discussed or negotiated terms of a contract, the reduction of those discussions and negotiated terms into a written document

means that they had intended to integrate those oral terms into that written document which must be considered to be the receptacle of the entire agreement as between the parties. The rule has found itself to have been adopted in legal colloquial parlance in our courts by the expression “the document speaks for itself”. The Supreme Court of Pakistan succinctly clarified the rule and the exception to the rule in the decision reported as *Muhammad Shafi and other vs. Allah Dad Khan*, PLD 1986 SC 519, wherein it was held that:

> “. . .Before I advert to the factual aspect of the case it would be proper to resolve the legal controversy. In support of his first contention as to the inadmissibility of the oral evidence Mr. A. R. Sheikh relied on a passage in the Principles and Digest of the Law of Evidence by M. Monir at page 887 which runs as under:
>
> “The Privy Council has distinctly held that in construing a document oral evidence of the intention of the parties to the document is inadmissible and that the express terms of a document cannot be contradicted by any oral evidence of the intention of the parties.”
>
> (Balkishen Das vs. Legge 22 A 149 (PC) and K.S. Feroz Shah vs. Sohbat Kha etc. AIR1933 PC 178)
>
> “The general rule“ says Chief Justice Tindal in Shore v. Wilson “ I take to be that where words of any written instrument are free from ambiguity in themselves and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict plaint common meaning of the words themselves, and that in such case evidence dehors the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument it is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument nor any party in takin under it, for the ablest advice would be controllers and the clearest title undermined if, at some future parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself.”
>
> It may here be said that the principle cited is applicable only where both the parties rely on the document in which case there is prohibition to admit oral evidence qua the intention of the parties to the document. . .
>
> There cannot be any cavil with this principle. But in Balikshen Das and others (supra), the Privy council while construing section 92 of the Evidence Act nevertheless said that this was subject to the provisos. In effect therefore, whether the case is one where the validity of the sale itself is in question either because of misrepresentation, fraud,

> mistake or failure of consideration, the evidence led is not intended to alter the terms of the documents but to prove its invalidity."

36. In the present case, neither party has challenged the validity of the document. Therefore, applying the principles laid down by the Supreme Court in the *Muhammad Shafi* case (supra), Clauses 5 and 9 are evidence that Defendant, at the time of entering into the sale agreement, assured Plaintiff that the suit property is free from all claims, lien, charge and encumbrances. Therefore, if the suit was maintainable, then issue no.(ii) would have been decided in the affirmative in favour of Plaintiff.

37. With regard to issue no.(iii), Defendant's position, in his Written Statement and during his evidence, has been that Plaintiff at all times knew that the suit property was mortgaged with the bank. If this was the case, then it is not understood why Defendant agreed to give an assurance in writing, as set out in Clauses 5 and 9 of the "Agreement to Sell", that the suit property was clear and free from all kinds of encumbrances, lien, mortgages, etc. The onus of proof in support of issue no.(iii) was on Defendant. Defendant has not been able to prove, based on either oral or documentary evidence, that Defendant, at the time of entering into the sale transaction, had disclosed to Plaintiff that the suit property is mortgaged with the bank and that Plaintiff had agreed to pay off such liabilities. Therefore, once again, with the caveat that the suit is not maintainable issue no.(iii) is decided in the negative in favor of Plaintiff.

38. With issues nos. (ii) and (iii) decided in favor of Plaintiff, the next question to arise is its consequences notwithstanding the suit is not maintainable. In *Muhammad Sadiq v. Muhammad Mansha*, PLD 2018 SC 692, the Supreme Court of Pakistan dealing with the consequence of a suit for specific performance involving a mortgage, held as follows:

> "6. In our view, law that was regarded as settled 125 years ago can hardly be disturbed today. As will be seen from the foregoing passages, the equity of redemption is simply the interest in the property that remains with the mortgagor minus the interest created thereon in favour of the mortgagee, and it is in this interest that can be dealt with by the mortgagor in accordance with law. It follows from this that if the mortgagor enters into an agreement to sell subsequent to the creation of the mortgage, he can do so. He is then selling his property burdened as it is with the mortgage in favour of the mortgagee, i.e. he is disposing off the equity in redemption. As this is permissible under law, it follows that if the mortgagor having entered into such a agreement to sell does not abide by the same, then the buyer of the property is entitled to bring a suit for specific performance. Of course the rights and interests of the mortgagee will not be defeated, since the

> buyer will step into the shoes of the mortgagor as sell. If the factum of the mortgage is known to the buyer then he can simply join the mortgager as a defendant in the suit so that if he succeeds in obtaining a decree for specific performance, the rights of the various parties can be appropriately dealt with. However, even if he succeeds in obtaining a decree for a specific performance, the right of the various parties can be appropriately dealt with. However, even if the factum of mortgage is unknown to the buyer and does not come to light during the course of the suit, any decree obtained by the buyer would still, and nonetheless, remain subject to the rights and interests of the mortgagee."

39. In view of the above, the consequences of Plaintiff having knowledge of the mortgage prior to the sale transaction to the extent of the suit for specific performance is inconsequential. This is because Plaintiff would have acquired the equity of redemption in the suit property on the conclusion of the sale. Of course, prior information may have impacted the sale price and the mode of the sale transaction, but overall, in light of the ***Muhammad Sadiq*** case (supra), it would not have mattered to Plaintiff's suit of decree for specific performance. In the circumstances, as Plaintiff's suit is not maintainable, the issues is answered accordingly.

Issue Nos. (iv) and (v)

40. As the suit is not maintainable, and for the reasons set out in Issue no.(i), the Issue Nos. (iv) and (v) are decided in the negative and against the Plaintiff.

Issue No. (vi)

41. The relief of a decree for specific performance is a discretionary relief. In the present case, it is admitted that Plaintiff has been in possession of the First Floor of the bungalow on the suit property since June 2005 till present. Further, Plaintiff, in paragraph 7 of his Affidavit in Evidence, states on oath that the second floor of the suit property came into the possession of Defendant after about 1.5 years from June 2005, whereafter Defendant allegedly handed over the possession of the second floor to Plaintiff. The Plaintiff claims to be in exclusive and lawful possession of the second floor. Further, he may well be in possession of the second floor from 01.01.2007 onwards. Defendant's witness has denied that the Plaintiff was in possession of the ground floor, whereas he has admitted that Plaintiff is in physical possession of the second floor after he broke open the lock on the second floor. The point of the matter is that when Defendant handed over peaceful and vacant possession of the first floor of the suit property to

Plaintiff, he had part-possession of the suit property, and arguably there was also part-performance of the "Agreement to Sell", too. In *Abdul Ghani v. Muhammad Shafi and 4 Others*, 2007 SCMR 1186, the Supreme Court of Pakistan, in a matter involving specific performance, made the following observations regarding part-performance of an agreement where the Plaintiff had possession of the suit property:

> "9. There is no cavil to, the proposition that possession delivered under the sale agreement is a shield anchor to protect the right of the vendee and he may if time was not fixed in the agreement for completion of sale on payment of sale price, claim the specific performance of the agreement within reasonable time and thus, in such a case, time may not be the essence of the contract but this is not an inflexible rule to be made applicable in every case as the remedy of specific performance of contract is an equitable remedy which is always in the discretion of Court and suit for specific performance may be defeated if the plaintiff without any legal excuse failed to perform his part of the contract within the time specified therein. In the normal circumstances, the limitation in the suit for specific performance of the contract is not enlarged, in the light of the general principle that in respect of sale of immovable property, time is not essence of contract, unless a sufficient cause and a strong reason is shown for filing the suit beyond the statutory period. The above rule may not be helpful to the plaintiff/vendee who was not vigilant about the performance of his part of the contract and contributed in the delay caused in completion of the sale. "

Therefore, in light of the observations in the *Abdul Ghani* case and because the Plaintiff's case fails and he cannot claim title in the suit property, the Plaintiff cannot derive any advantage from his possession of part of the suit property arising out of the "Agreement to Sell". Plaintiff's part-possession, at best during the pendency of litigation, served as a shield and may not be used as a sword against Defendants title in the suit property (presently the legal heir's), notwithstanding the bank's rights of mortgagee in the suit property.

42. There is another aspect arising out of Plaintiff's possession and letting out of the second floor of the bungalow on the suit property. While Defendant has denied handing over possession of the second floor as well as the ground floor to Plaintiff, the latter has also alleged that he put up the second floor and ground floor on rent. Plaintiff claims in paragraph 8 of his Affidavit in Evidence that the daughter of Defendant owes him rent and another tenant, namely one Muhammad Ilyas is paying him rent of Rs.5,000 p.m. Defendant has denied his daughter was ever a tenant of Plaintiff, however, in the cross-examination of Defendant's witness, Defendant states that Plaintiff had broken the lock of the

second floor and taken possession of the second floor. Defendant's witness claimed during his cross-examination that he had no knowledge that the second floor was rented. In other words, Defendant's witness did not deny that Plaintiff rented out the second floor of the bungalow on the suit property. The upshot of this is that if Plaintiff's claim is taken to be true, he has been in physical possession of the second floor of the bungalow for 1.5 years after June 2005, i.e. from January 2007 onwards. The total period of possession of the second floor by Plaintiff is roughly 16 years and 8 months. Assuming that the second floor has been occupied throughout this period and that the average rent collected (as claimed by Plaintiff) was Rs.5,000 per month and never increased or enhanced during this time, the total rental income earned by Plaintiff for the second floor alone would be about Rs.1,000,000 (Rs.5,000 p.m. x 200 months). Further, as of June 2005, Plaintiff had made part payment of Rs.1,150,000 to Defendant and deposited an additional sum of Rs.1,000,000 with the Nazir of this Court.

43. As this Court has come to the conclusion that Plaintiff is not entitled to a decree of specific performance, and there is conclusive evidence that Plaintiff occupied the first floor of the bungalow since June 2005 and the second floor since January 2007, as well as rented out and enjoyed the rented income to the exclusion of Defendant, therefore Plaintiff's 2005 payment of PKRs.1,150,000 towards advance sale price / earnest money /token payment - all stand adjusted against the Plaintiff's use and occupation of the first and second floors of the bungalow on the suit property for the period from July 2005 to August 2023.

44. The possession of the second and third floors of the property should be handed over to the Legal Heirs of the Defendant within six (6) months from 1st September 2023. During this period, the Legal Hiers of the Defendant and/or the Mortgagee Bank, jointly and severally (to be decided either in administration proceedings of the deceased Syed Qamar Hussain or legal action by the mortgagee bank), will remain entitled to mesne profit of Rs.50,000 per month arising out of the suit property from September 2023 onwards to be adjusted against the sum of Rs.1,000,000 plus profit accrued thereon deposited by the Plaintiff with the Nazir pursuant to the Order of this Court on 27.04.2010. In the event that Plaintiff does not vacate and handover peaceful and vacant possession of the suit property to the legal heirs of Defendant and/or the Mortgagee Bank then within six months from 1st September 2023, the mesne profit of Rs.50,000 commencing from the end of the sixth month to the end of the twelfth month will stand revised to mesne profit of Rs.80,000 per month. If Plaintiff still does not vacate the property after one (1) year from 1st September 2023, then the Legal Heirs of Defendant and/or the Mortgagee Bank, will be at liberty to take

appropriate action against Plaintiff in accordance with law in addition to continue to claim Rs.80,000 mesne profit per month commencing from the end of the six months from 1st September 2023 onwards out of Plaintiff's funds deposited with Nazir on 27.04.2010 and profit accrued thereon until Plaintiff hands over peaceful and vacant possession to Legal Hiers of Defendant and/or Mortgagee Bank.

45. It is an admitted position that the suit property is mortgaged with a bank whose identity is unknown. Therefore, as the Mortgagee Bank also has a legitimate claim, Nazir will continue to retain the funds arising out of the suit property as mentioned herein along with profit until the Legal Hiers of Defendants file a letter of administration or the Mortgagee Bank initiates legal action against the Legal Heirs of Syed Qamar Hussain in respect of the suit property for determination of entitlement of funds accruing from the suit property as set out in this Judgment.

46. It is clarified that as and when Plaintiff hands over peaceful and vacant possession of the first and second floors of the bungalow on the suit property to Defendants, Plaintiff will intimate the same to learned Nazir, who will verify the same and disburse the balance funds along with profit accrued thereon to Plaintiffs subject to any deductions made post 1st September 2023 as discussed herein above. The deducted amount retained by Nazir will be re-invested in profit earning scheme until the fate of the funds is decided between the Legal Hiers of Syed Qamar Hussain and the Mortgage Bank in the suit property.

47. Given the above facts, circumstances and discussion, I am of the opinion that Plaintiff's claim is time-barred, and he has also failed to prove his case. Therefore, the suit of the Plaintiff is dismissed in the above terms.

48. Both parties will bear their own costs.

Copy of this Judgment for the purpose of record to be sent to the Deputy Director (C&S) LARP, KDA Scheme-35, Karachi Development Authority, Lines Area Re-Development Project, K.D.A Scheme No:35, Karachi, 10th Floor Civic Center, Gulshan-e-Iqbal

Karachi;
Dated: 26.08.2023 J U D G E