

**IN THE HIGH COURT OF SINDH AT KARACHI**

**II<sup>nd</sup> Appeal No. 174 of 2020**

**Present**

**Mr. Justice Muhammad Jaffer Raza**

Shujat Ali Baig ..... Appellant.

Versus

Muhammad Aslam Mufti ..... Respondent.

Mr. Mujtaba Sohail Raja, Advocate for the Appellant.

Mirza Sarfaraz Ahmed, Advocate for the Respondent.

Dates of Hearing: 16.04.2025, 02.05.2025 and 15.05.2025.

Date of announcement: 11.08.2025

**J U D G M E N T**

**MUHAMMAD JAFFER RAZA – J:** The instant Second Appeal under Section 100 CPC has been preferred by the Appellant being aggrieved with the Judgment and Decree of the learned Appellate Court dated 04.09.2020 (“**Second decree**”) passed in Civil Appeal No.88/2009 (“**Appeal**”). The above noted Appeal emanated from the Judgment and Decree of the learned Trial Court dated 10.08.2009 (“**First decree**”) passed in Civil Suit No.502/2006 (“**Civil Suit**”), which was filed by the Respondent for specific performance of contract, declaration, injunction and possession.

2. Brief facts of the case pertaining to the instant Appeal are that the Respondent filed the above-noted Civil Suit with the following prayer clauses:-

- “i) Declare that the plaintiff is a bonafide purchaser of the Property bearing No 5-A.8/17, measuring 133 sq. Yards situated at Old Nazimabad, Karachi against total sale consideration of Rs.18.50.000/- and is entitled to decree for the same.
- ii) Order the defendant to specifically perform the contract dated 28.04.2004 by getting sale deed registered in respect of Ground plus two Story residential house No.5-A, 8/17,

- measuring 133 S. Yards situated at Old Nazimabad, Karachi in favour of the plaintiff.
- iii) The in default in compliance of decree by the defendant the Nazir of this Honorable Court be directed to execute and get the sale deed registered in favour of the plaintiff in respect of suit property hearing No.5-A 8/17, measuring 133 S Yards, Old Nazimabad Karachi in any manner.
  - iv) That possession of suit property bearing N.5-A 8/17 measuring 133 S. Yards. Old to the Nazimabad Karachi, be handed over to the plaintiff in pursuance to the decree passed by this Honorable Court.
  - v) Restrain the defendant from alienating the suit property and or creating any third party interest, encumbering or causing any burden or charge or mortgage of the suit property bearing No. 5-A. 8/17, measuring 133 S yards Nazimabad Karachi in any manner whatsoever.
  - vi) Costs of the suit.
  - vii) Any other relief or relieves which this Honorable Court may deem fit in the circumstances of the case.”

3. Prior to noting the arguments of the learned counsels, the facts pertaining to the present appeal shall be succinctly captured in the instant paragraph. The Respondent filed the above-noted civil suit with the prayer clauses reproduced above. Thereafter, the Appellant, filed his written statement denying thereby the claim of the Respondent. The learned Trial Court vide first decree, decreed the suit of the Respondent against the Appellant. Thereafter, the Appellant filed Civil Appeal against the first decree noted above and the same was dismissed. It is pertinent to mention that during the pendency of the noted appeal the nazir of the learned Trial Court executed Sale Deed in favour of the Respondent in compliance of the decree passed by the learned Trial Court. The Appellant therefore has impugned the concurrent findings of the courts below.

4. It is contended by learned counsel for the Appellant that findings of both the Courts below are perverse and liable to be set aside. He has invited my attention to relevant parts of the cross-examination of the Respondent and more specifically has stated that the time was essence of the contract and the same admitted by the Respondent during the course of his examination. He has further argued that both the Courts below, without appreciating of evidence placed on record, decreed the Civil Suit filed by the Respondent. He has further argued that in a very “haphazard” and “hasty” manner, the Respondent sought execution of the first decree by filling

Execution Application No.09/2010 and thereafter the Nazir executed the Sale Deed and handed over the possession during the pendency of the above noted first Civil Appeal. He has further argued that averments of the Respondent vis-a-vis insufficiency of title is nothing but an afterthought and beyond the pleadings of the said Respondents. He has stated that even if the Respondent had made out a case of specific performance even then the relief is discretionary and the discretion was wrongly exercised in favour of the Respondent by the both the Courts below. Learned counsel relied upon *Nazar Hussain and another v. Syed Iqbal Ahmed Qadri<sup>1</sup>, Muhammad Azim v. Pakistan Employees Cooperative Housing Society Ltd. Karachi and 4 others<sup>2</sup>, Rab Nawaz and 13 others v. Mustaqeem Khan and 14 others<sup>3</sup>, Malik Bahadur Sher Khan v. Haji Shah Alam and others<sup>4</sup>, Sohail Ahmed Rana v. Munair Ahmed Rana and 3 others<sup>5</sup>, Muhammad Talib v. Muhammad Sarwar Naz and another<sup>6</sup>.*

5. Conversely, learned counsel for the Respondent has argued that the instant second appeal is not maintainable as the same has been preferred against the concurrent findings of the Courts below and the same does not fall within the constrained scope of Section 100 C.P.C. He has further averred that both the Courts below have appreciated the evidence recorded by the respective parties and pronounced the judgment and decree in accordance with the same. He has contended that the time was never essence of the contract and the same was extended by the Appellant repeatedly. In that regard, he has further argued that the Appellant by sending him the notice seeking performance, beyond the period stipulated in the agreement, itself shows that time was never the essence of the contract as the same was extended multiple times. It is further averred that the Appellant has miserably failed to point out any misreading or non-reading of evidence and the instant second appeal is liable to be dismissed with cost. He has lastly argued that Respondent is in possession of the subject property and the

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<sup>1</sup> 2022 SCMR 1216

<sup>2</sup> PLD 1985 Karachi 481

<sup>3</sup> 1999 SCMR 1362

<sup>4</sup> 2017 SCMR 902

<sup>5</sup> 2019 CLC Note-7

<sup>6</sup> 2019 CLC 623

registered Sale Deed has also been executed in favour of the said Respondent. Therefore, allowing the instant appeal would involve not only his dispossession but also a cancellation of a registered instrument in his favour. Learned counsel has relied upon *Muhammad Iqbal v. Mehboob Alam*<sup>7</sup>, and *Muhammad Asif Awan v. Dawood Khan and others*<sup>8</sup>.

6. Order XLI, Rule 31 C.P.C. mandates an appellate court to determine points for determination, the decision on those points, and the reasons for the decision. The said principle was also expounded in the case of *Meer Gul vs. Raja Zafar Mahmood through legal heirs and others*<sup>9</sup>. The points for determination are set out below: -

1. **Whether the Appellant was in breach of the agreement?**

2. **Whether the concurrent findings are liable to be set aside?**

7. I have heard learned counsel for the parties and perused the record with their able assistance. The findings on the points for determination are as follows: -

**POINT No.1.**

8. The instant point of determination can be sub-classified into two distinct limbs i.e. time being the essence of the contract and the willingness and ability of the Respondent. Prior to delineating on the classifications above, it will be expedient to first note that the execution of the agreement of sale dated 28.04.2004 has been admitted between the parties. It is further not disputed that that Rs.465,000/- was the remaining sale consideration which was to be paid from the Respondent to the Appellant.

**Time of the essence**

9. The first limb of the argument pertains to whether time was of the essence in the noted agreement. In this respect, both the learned counsels have given contrasting versions and therefore the said issue will be determined by examining the contents of the agreement and the conduct of the respective parties. The said agreement stipulates as under: -

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<sup>7</sup> 2015 SCMR 21

<sup>8</sup> 2021 SCMR 1270

<sup>9</sup> 2024 SCMR 1496

*“8. That this agreement is IRREVOCABLE and the time prescribed above for completion of the transaction is the essence of this contract, otherwise the vendor may be forfeited above money.”*

10. It is evident from the plain reading of the noted clause that the parties intended time to be the essence of the contract. However, what will have to be deciphered at this juncture, is the conduct of the parties. To adjudicate this aspect, it will be relevant to peruse the examination of the respective parties. Relevant excerpts from the examination of the Appellant are reproduced as under: -

Examination-in-chief.

*“After expiry of agreed time of four months I wrote letter to the plaintiff for payment of balance amount even after expiry of four months but the plaintiff failed to pay the balance amount though I granted sometime after expiry of agreed four months. Vide final notice dated 03.12.2005 I given seven days time to the plaintiff to pay the balance amount and in case of failure his paid amount will be forfeited and the sale agreement will be treated as cancelled. The plaintiff did not pay the balance amount, therefore, sale agreement was cancelled by me vide letter dated 04.05.2006.”*

Cross examination.

*It is correct that I had obtained loan from Habib Bank against the suit property which was mortgaged with the Habib Bank also..... It is correct that the agreed sale consideration of the suit property was Rs. 18,50,000/- (Rupees Eighteen Lacs Fifty Thousand Only) At the time of sale agreement dated 28.04.2004 I received Rs. 1,85,000/- as part payment and subsequently on 25.8.2004 I received another amount of Rs. 12,00,000). (Rupees Twelve Lacs Only) as further payment. It is correct that the plaintiff had to pay the balance amount of Rs.4,65,000/- only. It is correct that the plaintiff came to me to pay the balance amount of Rs. 4,65,000/- subject to production of title documents. I do not remember the date on which the plaintiff came for this purpose. Voluntarily says the plaintiff had come to show the title documents to whom I had given photocopy of the title documents....It is correct that I have filed four documents as annexures D/1 to D/4 with the written statement and no courier receipt is filed with the written statement. It is correct that it is not mentioned in Annexures D/1 to D/4 that by which modes of service the said annexures sent to the plaintiff..... It is incorrect that the plaintiff lastly gave photocopy of cheque of balance amount of Rs. 4,65,000-on 11.03.2006 and requested to deliver the photocopies of title documents to prepare the sale deed.....It is incorrect that I did not receive the balance amount from the plaintiff because I was busy due to illness of my mother. It is correct that after ailment of my mother I went to USA also.....It is correct that Nazimabad was established in 1951 and the lease of the suit property was expired in 2001. It is correct that I have not got extended lease of the suit property till now. It is correct that dues of Government taxes and utility bills against the suit property are not cleared upto date and I do not remember as upto what period the said dues are paid. Voluntarily says suit property is lying locked since last about eight years. It is correct that I had agreed to clear all the dues over the suit property prior to execution of conveyance deed. It is correct that I have not returned the paid*

*amount of Rs. 13,85,000/- to the plaintiff till now. I have cancelled the sale agreement. It is correct that I have not returned the paid amount of the plaintiff with the cancellation letter/notice. It is incorrect that I have not sent any cancellation letter to the plaintiff I am not ready to sell the suit property even the sale consideration is increased by the plaintiff. It is incorrect that I am not ready to complete the sale transaction because market value of the suit property has been enhanced.”*

11. It is evident from the perusal of the record, more particularly cross-examination of the Appellant, that the Appellant through his conduct extended the time for performance of the agreement and in this respect, it is held that time was never the essence of the contract. The Appellant in this regard, after the expiry of the four months period stipulated in the agreement, issued several letters admittedly requesting the Respondent to pay the balance sale consideration. It is further admitted by the Appellant that on 03.12.2005 (approximately 18 months after execution of the agreement) he gave an additional seven days to the Respondent to pay the balance sale consideration. He has further admitted that the Respondent had approached him with the balance sale consideration but the same was not accepted by the Appellant. Further, the Appellant produced various letters, most notably dated 01.11.2004, 15.03.2005 and 03.12.2005 and 04.05.2006 after the expiry of the agreement to sell between the parties. However, the Appellant, as noted above failed to exhibit the courier receipts along with the said letters. Even if the courier receipts were exhibited by the Appellant, the same would only buttress the case of the Respondent in respect of the Appellant extending the time for performance. The Appellant has further admitted that the lease of the property had expired and his examination suggests, as stated above, that he did not comply with the material terms of the agreement between the parties. Further, as is evident from the examination of the Respondent, the Appellant accepted part of the sale consideration from the Respondent, after expiry of the noted period. Relevant excerpts from the examination of the Respondent are reproduced below: -

Examination-in-chief

*“I prepared a cheque of balance amount of Rs.4,65,000 on 11.03.2006 but defendant refused to receive the same therefore, I sent photo state copy of the said cheque to the defendant and asked him to transfer the sit property by*

*executing registered sale deed...Office of defendant is situated in Habib Bank Plaza 19 floor where I visited him alongwith Broker namely Abdul Majeed about forty to fifty times with request to receive the balance amount and complete the sale transaction. Our visit in the office of defendant can be verified from the reception of Habib Bank Limited Head Office where every visits had been recorded in the register alongwith my name and NIC number. The defendant first avoided and kept me on false promise but finally refused to execute the sale deed of the suit property in my favour by saying that the prices of the properties have been enhanced. Thereafter in March 2005 I had heart attack and thereafter my bypass surgery was conducted on 05.03.2005 and I remained in Hospital for about seven days and thereafter was confined to Bed for about three months at Home. After recovery I again contacted the defendant to complete the sale transaction but he refused therefore I sent a legal notice dated 16.05.2006 through courier service which was received by the defendant but he did not reply the same. I produce copy of legal notice dated 16.05.2006 alongwith courier service receipt at Esb: P/1/F (original seen and returned). I have not received any letter, notice or other documents from the defendants side....I pray that the suit property be transferred in my name through registered sale deed and I am ready to pay the balance amount.”*

Cross-examination

*“It is correct that nothing was reduced in writing regarding extension of time for payment of Rs.4,65,000/- It is correct that as per sale agreement time was essence of the contract. It is correct that I have not filed bank statement of my account showing the balance of Rs.4.65.000/-on 11.03.2006.”*

12. The cumulative reading of the reproduced examinations of the respective parties can only lead to an inevitable conclusion that time was never the essence of the contract. I agree with the conclusion of the learned Appellate Court that the repeated extension of time by the Appellant cannot sustain the plea taken at trial. The learned counsel for the Appellant has repeatedly invited my attention to the cross examination of the Respondent, wherein the Respondent has admitted that time was the essence of the agreement. However, when the said statement is read in juxtaposition with examination otherwise recorded, it can only lead to the conclusion elucidated above. Even otherwise, the noted admission only refers to the contents of the sale agreement and not the conduct of the parties. I further concur with the deduction of the learned Appellate Court that the Appellant failed to fulfil the prerequisites stipulated under the agreement and was at all relevant times not able to comply with the same. In the absence of such fulfilment the Respondent could not be expected to pay the remaining sale consideration. Even the said

cancellation by the Appellant was issued no earlier than 04.05.2006 which is approximately two (2) years after the agreement was executed.

**Willingness and ability.**

13. The willingness and ability of the Respondent can also be deciphered from his conduct and his repeated and uncontroverted attempts to pay the balance sale consideration. It is noted that the repeated attempts narrated by the Respondent during his examination were never effectively cross-examined by the Appellant. The only delay attributable to the Respondent was the brief one during his personal ailment. Otherwise, it is apparent that the Respondent was always willing and able to perform his part of the agreement, particularly when he had parted with a majority of the sale consideration. Further, the willingness and ability of the Respondent can be gauged from the publication in the newspaper dated 21.10.2004, informing the public at large about his intention to purchase the subject property and have the same transferred in his name.

14. In similar circumstances, the Hon'ble Supreme Court in the recent case of *Zeeshan Pervez (Late) through Legal Heirs Versus Muhammad Nasir*<sup>10</sup> held as under: -

*“In this context, a conjoint reading of Clauses 2, 3, and 5 of the contract reveals that the responsibility for the balance payment by the vendee depended on the vendor fulfilling specific obligations. These obligations included (a) securing a Clearance Certificate or No Objection Certificate (NOC) from the Bank, (b) settling all outstanding dues, debts, claims, loans, mortgages, taxes, and any other liabilities associated with the property, (c) ensuring that the property's mutation was duly processed in the vendor's name, and (d) completing all necessary sale formalities, which encompassed the registration of the sale deed or granting a General Power of Attorney in favour of the vendee or his nominee. All of these conditions were expected to be fulfilled by the vendor on or before the 15th of August, 2013 deadline. Only after successfully meeting these prerequisites was the vendee obligated to pay the outstanding amount. However, evidence indicates that as late as the 9th of September, 2013, the property remained mortgaged (Exh.X/10), which severely undermined the vendor's position. Consequently, the penalty of forfeiture stipulated in Clause (4) of the contract could not legitimately be invoked, nor could the vendee be deemed at fault for any failure to meet contractual obligations. In fact, it seems clear that there was no opportunity for the vendee*

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<sup>10</sup> 2025 SCMR 495



*to proceed with the balance payment. Despite this, the vendor attempted to shift the burden of his shortcomings onto the vendee by issuing a Notice dated 2nd of September, 2013, claiming that the contract had been cancelled due to the alleged non-payment of the balance amount.”*

15. The Hon’ble Court, in the same judgment, elaborated on the age-old principle of time being the essence of the contract in immovable property in the following words: -

*“Whether time is the essence of a contract always depends upon the wordings of an agreement, intention of the parties, and above all is a question of fact. This Court in *Jaiwanti Bai*<sup>13</sup> has observed that generally in a sale of immoveable property, time is not the essence of the contract, unless it is made so.”*

16. Moreover, in the case of *Muhammad Iqbal Versus Mehboob Alam*<sup>11</sup> the Hon’ble Supreme Court elucidated upon the burden of the respective parties seeking performance of immovable property, in the following words: -

*"In relation to contracts of immovable property the rule is that time ordinarily is not the essence, however, this by no means is an absolute rule and it is always open to the party, who claims exception thereto, to establish otherwise from the contents/text, letter and spirit of the agreement and/or from the intent and conduct of the parties, as well as the attending circumstances."(Emphasis added)*

17. It is held, that the Appellant in this regard has failed to establish from the intent and conduct of the parties that time was of the essence. The burden in this regard, was on the Appellant to prove the exception to the otherwise established principle, that time is never the essence in contracts of immoveable property<sup>12</sup>. Even otherwise, the Appellant has failed to point out any blatant misreading and non-reading of evidence by the courts below. Therefore, the instant second appeal does not fall within the narrow parameters of Section 100 CPC as expounded in the case

<sup>11</sup> 2015 SCMR 21

<sup>12</sup> The Supreme Court of India in the case of *Mrs. Saradamani Kandappan versus Mrs. S. Rajalakshmi & Others*, Civil Appeal No.s 7254-7256 of 2002, has revisited the said principle in light of modern-day circumstances. I do not wish to make any observation in this regard, given the binding precedents of the Hon’ble Supreme Court as noted in the instant judgment. However, the Hon’ble Supreme Court in the case of *Malik Bahadur Sher Khan versus Haji Shah Alam* reported at 2017 SCMR 902 has interpreted the said principle in light of present circumstances.

of *Faqir Syed Anwar Ud Din deceased through LRs Versus Syed Raza Haider and other*<sup>13</sup>.

18. The judgements relied upon by the learned counsel for the Appellant are distinguishable for the following reasons: -

- In the case of **Rab Nawaz** (supra) the legality of the sale agreement was challenged on the ground of fraud and undue influence. The Civil Appeal before the Hon'ble Supreme Court was against conflicting findings of the courts below. Further, the court delineated upon the hardship caused to the respective parties in case performance was allowed.
- The case of **Sohail Ahmed Rana** (supra) provides no assistance to the learned counsel for the Appellant. In the said case the Nazir of this court was issued show cause notice in reference to a sale deed executed by him. In the present case, the Nazir of the learned Trial Court executed the Sale Deed in favour of the Respondent in compliance of the decree of the learned Trial Court.
- Likewise in the case of **Muhammad Talib** (supra) the Nazir of this court acted upon a judgement prior to the decree holder filing an execution application. It is reiterated that the Nazir of the Trial Court in compliance of the decree, executed the Sale Deed after the Respondent preferred the noted execution application.
- In the case of **Nazar Hussain** (supra) specific performance was refused for the reason that the vendee was unable to show that he was ready and willing to perform his part of the obligation. Moreover, the sale consideration paid by the vendee was only 5.8 % of the total sale consideration.
- In the case of **Malik Bahadur Sher Khan** (supra) the Hon'ble Supreme Court set aside three (3) concurrent findings of the courts below due to misreading and non-reading of evidence. The Hon'ble Court further directed the vendor to pay an amount over and above the amount received

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<sup>13</sup> PLD 2025 Supreme Court 31

to the vendee. In the present case, considering that there is no material mis-reading and non-reading of evidence, and the Respondent is in possession of the subject property pursuant to the Sale Deed executed by the Nazir of the trial court, I do not consider the dicta applicable to present circumstances.

19. The learned counsel for the Appellant, during the course of arguments, placed before me various judgements to illustrate his contention that this court has the power to cancel the Sale Deed executed in the favour of the Respondent whilst allowing the instant appeal. Whilst I appreciate the research undertaken by the learned counsel in this regard, I have deliberately omitted to consider the said judgements for the reason that it has already been held above that no case of interference has been made out by the Appellant. Therefore, the argument advanced by the learned counsel is in this regard superfluous.

20. During the course of the instant deliberation, I have also considered granting compensation to the Appellant due to increase in the value of the property and the devaluation of the currency. I have however opted not to grant any such relief for the reason that the Appellant, as noted above, delayed performance of the agreement and the Respondent in this regard was always ready and willing. Further, the adjudication of the case, at least by present standards, was expeditious.

21. In light of what has been held above the no case of interference has been made out by the Appellant. Consequently, the instant appeal is dismissed with no order as to costs.

J U D G E

Nadeem Qureshi "PA"