

IN THE HIGH COURT OF SINDH, KARACHI

High Court Appeal No. 229 of 2016
[*Abdul Razzak vs. Aijaz Hayat Khan & others*]

PRESENT:

Mr. Justice Arshad Hussain Khan

Mr. Justice Amjad Ali Sahito

Appellant: Through Mr. Badar Alam, Advocate.

Respondents: Through Mr. Anwar Hussain, Advocate.

Date of Hearing: 29.04.2026

Date of Decision: 29.04.2026

JUDGMENT

ARSHAD HUSSAIN KHAN, J: Through the instant High Court Appeal, the appellant has assailed the impugned judgment dated **15.06.2016** and decree dated 08.08.2016, passed by the learned Single Judge of this Court in Suit No.1040 of 2006, whereby the suit instituted by the appellant for recovery of Rs.1,01,00,000/- was dismissed.

2. Briefly stated, the case of the appellant/plaintiff, as set out in the plaint, is that he is a property dealer carrying on business under the name and style of “Usman Corporation” in Karachi. According to the appellant, respondent No.1, through respondent No.2 acting as his property agent, offered for sale a commercial plot bearing No.59-C, 12th Commercial Street, Phase-II Extension, D.H.A., Karachi, measuring 200 square yards, for a total consideration of Rs.2,19,00,000/-. In pursuance thereof, the appellant allegedly paid Rs.20,00,000/- as advance through two cheques of Rs.10,00,000/- each, against which respondent No.2 executed a receipt dated 14.03.2005, stipulating that the balance amount would be paid at the time of transfer before D.H.A. on or before 15.04.2005. The appellant further claimed that respondent No.1 had shown him the original transfer letter issued by D.H.A. in respect of the suit property and had also supplied copies thereof along with his CNIC. According to the appellant, since he intended to re-sell the property at a higher price, respondent No.2, with the consent of respondent No.1, extended the transfer date up to

25.05.2005 through an endorsement made on the receipt. It is the appellant's case that he subsequently found a prospective purchaser willing to buy the property for Rs.2,50,00,000/- and, upon applying to D.H.A. for issuance of a clearance certificate, was informed on 11.07.2005 that the property had already been transferred to another person on 25.04.2005 by respondent No.1 in collusion with respondents No.2 and 3, despite the alleged extension granted to the appellant. The appellant alleged that such conduct caused him financial loss amounting to Rs.31,00,000/-, being the difference between the agreed purchase price and the proposed resale price, besides mental torture, business loss, and reputational damage quantified at Rs.50,00,000/-. After issuance of a legal notice and exchange of replies, the appellant instituted the underlying suit for recovery of the aforesaid amounts.

3. Upon issuance of summons and notices, respondents/defendants No.2 and 3 were proceeded against *ex parte*, whereas respondent / defendant No.4 (D.H.A.) was debarred from filing written statement. Respondent/defendant No.1, however, filed written statement and categorically denied the claim of the appellant/plaintiff. It was pleaded that the suit was *mala fide* and based on suppression of material facts. According to respondent No.1, the plaintiff, being an estate agent, had negotiated the transaction for onward resale in the open market contrary to D.H.A. rules, despite initially representing himself as the actual purchaser for personal use. It was further pleaded that although a receipt was executed through defendant No.2 in favour of the plaintiff, the latter failed to arrange the balance sale consideration within the agreed period and ultimately withdrew from the transaction. According to respondent No.1, it was thereafter settled that the plaintiff would have no concern with the property and the advance amount paid by him would stand forfeited, following which the property was sold to a third party. Respondent No.1 lastly contended that the plaintiff had failed to perform his obligations and had not approached the Court with clean hands; therefore, the suit was liable to be dismissed.

4. Out of the pleadings of the parties, the learned Single Judge framed issues and, after recording evidence and conducting full-fledged trial, proceeded to pass the impugned judgment whereby the suit of the

appellant/plaintiff was dismissed. The said judgment and decree have been assailed in the present proceedings.

5. Learned counsel for the appellant, at the very outset, submitted that under instructions he does not wish to press the matter on merits. He, however, confined his submissions to the extent of seeking return of the earnest money paid to respondent No.1 at the time of entering into the transaction. It was contended that time was not the essence of the contract and, moreover, there existed no specific term or condition agreed between the parties regarding forfeiture of the earnest money; therefore, according to learned counsel, the question of forfeiture of the said amount would not arise. In support of his contention, learned counsel placed reliance upon the case reported as *Raja Nasir Khan v. Abdul Sattar Khan and another* [PLD 1998 Lahore 20].

6. Learned counsel for respondent No.1, while controverting the limited submissions advanced on behalf of the appellant, contended that the appellant, having failed to perform his part of the contract within the agreed period, is not entitled to claim refund of the earnest money. It was submitted that the record clearly reflects that the appellant was unable to arrange the balance sale consideration and had himself withdrawn from the transaction, whereafter the earnest money stood forfeited in terms of the understanding arrived at between the parties as well as the prevailing practice in the property market. It was further contended that the appellant cannot be permitted to take advantage of his own default and seek equitable relief after having failed to establish his readiness and willingness to perform the alleged agreement. Learned counsel further submitted that the appellant himself was in breach of the contract and that the findings recorded by the learned Single Judge are based upon proper appreciation of the evidence available on record. Lastly, it was prayed that the appeal, even to the limited extent now pressed, is devoid of merit and liable to be dismissed. In support of his contention, learned counsel has relied upon the cases of *S.M. Shoaib Baghpati v. Umar Gul Agha and 3 others* [2017 CLC Note 4], *Ahmed v. Messrs Abdul Habib-Haji Muhammad Co.* [PLD 1957 (W.P.) Karachi 819], *Sheikh Allah Rakha v. Sheikh Muhammad Yousuf* [1990 MLD 1592], *Sarfaraz Haider and another v. Mst. Khatija Bai and 4 others* [1990 CLC 1649], (*Kuwar*)

Chiranjit Singh v. Har Swarup [AIR 1926 Privy Council 1], and *Bhalchandra Pandurang Rajandekar v. Mahadeo Laxminarayan Sharapqi and others* [AIR (34) 1947 Nagpur 193]

7. We have heard learned counsel for the parties, examined the material available on the record, gone through the impugned judgment, and have also considered the limited submissions advanced by learned counsel for the appellant regarding refund of the earnest money.

It is now a well-settled principle of law that the primary object of earnest money is to secure performance of the contract by the purchaser. If the transaction is completed, the earnest money forms part of the sale consideration; however, where the contract falls through on account of the default or failure of the purchaser to perform his obligations, the earnest money ordinarily stands forfeited in favour of the seller, even in the absence of an express forfeiture clause in the agreement.¹

8. In the present case, the record clearly reflects that the appellant himself failed to perform his contractual obligations within the agreed period and, as observed by the learned Single Judge in the impugned judgment, ultimately withdrew from the transaction owing to his inability to arrange the balance sale consideration. Significantly, the said findings have not been effectively controverted by the appellant before this Court. The learned Single Judge, after recording evidence and examining the material available on record, has also returned findings against the appellant on the question of readiness and performance of the agreement. In these circumstances, the forfeiture of the earnest money cannot be termed unlawful or unjustified.

9. Insofar as the reliance placed upon *Raja Nasir Khan v. Abdul Sattar Khan and another* [PLD 1998 Lahore 20] is concerned, the same is clearly distinguishable on facts and circumstances of the present case. Here, the appellant has failed to establish his readiness and willingness to perform his part of the contract. Mere assertion that time was not the essence of the contract, coupled with the absence of an

¹ *Ahmed v. Messrs Abdul Habib-Haji Muhammad Co.* [PLD 1957 (W.P.) Karachi 819], *Sheikh Allah Rakha v. Sheikh Muhammad Yousuf* [1990 MLD 1592], *Sarfaraz Haider and another v. Mst.Khatija Bai and 4 others* [1990 CLC 1649], *(Kuar) Chiranjit Singh v. Har Swarup* [AIR 1926 Privy Council 1], and *Bhalchandra Pandurang Rajandekar v. Mahadeo Laxminarayan Sharapqi and others* [AIR (34) 1947 Nagpur 193]

express forfeiture clause, does not by itself entitle a defaulting party to seek refund of the earnest money, particularly where the conduct of such party reflects inability and failure to complete the transaction within the agreed framework. In the circumstances, we are unable to persuade ourselves to agree with the contention of learned counsel for the appellant regarding refund of the earnest money.

10. In view of the foregoing discussion, we are of the considered opinion that the findings recorded by the learned Single Judge are based upon proper appreciation of the evidence and the applicable law, and do not suffer from any illegality or infirmity warranting interference by this Court in exercise of appellate jurisdiction. The appellant has failed to establish either his entitlement to the relief claimed in the suit or even to the limited relief regarding refund of earnest money now pressed before this Court.

Accordingly, vide our short order dated 29.04.2026, while maintaining the impugned judgment dated 15.06.2016 and decree dated 08.08.2016, the instant High Court Appeal along with all pending application(s), if any, was dismissed. The foregoing are the reasons in support of the said short order.

JUDGE

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