Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

F.A.O No.137 of 2020

M/s Performance Automotive Private Limited and others

Versus

Muhammad Safwan Javaid, etc.

Appellants by	:	Mr. Zafar Kundi, Advocate
Respondents by	:	Ms. Shazia Malik, Advocate
Date of Hearing	:	03-03-2021.

BABAR SATTAR, J.- The appellant is aggrieved by order dated 15.10.2020 passed by the learned Additional District Judge, Islamabad West whereby application filed by respondent No.1 under Order XXXIX Rules 1 and 2 CPC was accepted.

2. Learned counsel for the petitioner stated that respondent No.1 placed an order for purchase of Porsche 911 Turbo MY 2018 **("Vehicle")** for a total consideration of $398,845.00, of which partial consideration in the amount of Rs.22,503,000/- (equivalent to $195,075.00) was paid by respondent No.1 **("respondent").** The learned counsel for the appellant stated that the respondent continued to act in an irrational manner and insisted that the salesman of the appellant has committed at the time of booking the Vehicle that it will be delivered by August 2018. That clause 35 and 36 of Vehicle Order Agreement dated 02.04.2018 **("Contract")** provided a six-month delivery period. That the respondent threatened to terminate the Contract and by an email

dated 01.06.2018 the appellant offered to cancel the Contract and make a 100% refund while explaining that the delivery time is tentative as per the Contract. That the appellant repeated the same by email dated 27.08.2018 and certain correspondence took place between the appellant and the respondent which reflects that the appellant made considerable effort in order not to lose a customer. Consequently, it was communicated by the respondent on 10.11.2018 that he would stick to the Contract. The learned counsel for the appellant then stated that production schedule from respondent No. 4 ("**Porsche AG"**) was received on 13.12.2018 and 19.12.2018 was identified as freeze point after which no further customization could be ordered or features changed in relation to the Vehicle and the respondent was informed that the Vehicle would be delivered in the first fortnight of February, 2019. That on 21.12.2018 respondent once again cancelled the Contract and sought immediate refund of the advance. The learned counsel for the appellant stated that on 25.05.2019 the respondent filed a complaint with the Consumer Court established under the Islamabad Consumers Protection Act, 1995 and the said complaint was dismissed by the learned Consumer Court on 24.02.2020 for want of jurisdiction. That in the said complaint the respondent had sought only recovery and damages and not delivery of the Vehicle. That on 22.06.2020 the respondent filed a suit for specific performance, declaration and mandatory injunction. That meanwhile the appellant entered into an agreement to sell the Vehicle to a third party. The learned counsel for the appellant stated that where compensation and damages are sought in the alternative, specific performance

cannot be ordered as such alternate remedy is proof that the claimant would suffer no irreparable loss. He further stated that balance of convenience is in favour of the appellant as it has already entered into an agreement to sell the Vehicle to a third party. He relied on section 21 and 56 of the Specific Relief Act, 1877 **("Act")** to argue that the Contract cannot be specifically performed. That there was no *prima facie* case in favour of the respondent as the Contract stood cancelled on the basis of communication received from the respondent. That the Vehicle could not be delivered in accordance with the tentative schedule mentioned in the Contract due to the respondent's conduct. The learned counsel for the appellant relied on Secretary of State v. Mask & Co (AIR 1940 Privy Council 105), Abdul Rauf and others v. Abdul Hamid Khan and others (PLD 1965 SC 671), Molasses Export Co. Ltd. v. Consolidated Sugar Mills Ltd. (1990 CLC 609) United Bank Limited, D.I. Khan v. Jinda Bibi and 8 others (1990 CLC 1901), Barkat Ullah v. Wali Muhammad (1994 SCMR 1737), Rehmat Ali v. Additional District Judge, Multan (1999 SCMR 900), Kanwar Qutubuddin Khan v. Karachi Development Authority (2002 CLC 634), Amanat Khan and others v. Noor ur Rehman and others (2006 SCMR 1622) and Jubilee General Insurance Company v. Ravi Steel Company, Lahore (PLD 2020 SC 324).

3. Learned counsel for the respondent stated that in accordance with clause 17 of the Contract, respondent paid 50% of the consideration for the Vehicle on 03.04.2018 which is admitted and that 30% of the balance consideration was payable upon confirmation of date of manufacture and 20% upon

confirmation of shipment of the Vehicle. That neither the date of manufacture was ever communicated by the appellant to the respondent nor the date of shipment and consequently the respondent never breached any obligation under the Contract. He further stated that the appellant consistently breached his obligations under the Contract by failing to have the Vehicle delivered within a period of six months, by failing to communicate the realization of various threshold points identified in the Contract i.e. confirmation of manufacture schedule, shipment and delivery of the Vehicle, and it was in view of the appellant's dereliction under the Contract that out of frustration the respondent threatened to terminate the Contract. The learned counsel for the respondent stated that the appellant misrepresented himself all along as the Vehicle arrived in Pakistan on 17.09.2019, which was kept hidden from the respondent and also from the learned Consumer Court which was hearing the complaint of the respondent at that time. The appellant then clandestinely entered into third party agreement on 17.09.2019 for sale of the Vehicle, which was customized and manufactured pursuant to the respondent's order just to make an additional profit. The learned counsel for the respondent stated that the suit was filed on 22.06.2020 and an interim injunction was granted on 24.06.2020 which was confirmed by the impugned order. He submitted that the Contract had never been terminated in accordance with its terms and as the Contract is still in the field the respondent was seeking its specific performance while also seeking compensation and damages as an alternate remedy, which did not mean the Contract was not to be specifically

performed. The learned counsel for the respondent stated that the respondent did seek to terminate the Contract due to the appellant's breach of the Contract and repayment of the respondent's advance upon termination of the Contract. However, the appellant refused to accept such offer made by the respondent and continued to keep the Contract alive and sought to enforce its terms and thus the Contract is still in the field. That the appellant cannot be allowed to approbate and reprobate simultaneously and claim that while it wished to enforce the terms of the Contract when the respondent wished to terminate it and get a refund, but is to be deemed to have been terminated now that the respondent is seeking its enforcement. The learned counsel for the respondent submitted that the respondent has made out a *prima facie* case before the learned Civil Court. That balance of convenience is on his side and he would suffer irreparable loss if the customized vehicle produced pursuant to the Contract, which model of the Vehicle is no longer in production, is sold to a third party as the respondent cannot procure a similar vehicle from the market anymore. Consequently, the impugned order suffers from no illegality and the appeal is liable to be dismissed.

4. Let us first consider the question of whether or not a contract can be specifically enforced if the party seeking its enforcement claims compensation and damages as an alternate remedy, as lack of irreparable loss in the present case was the mainstay of the appellant's argument seeking setting aside of the injunctive relief granted by the learned civil court. Puri Terminal

Limited v. Government of Pakistan (2004 SCMR 1092) and Bolan Beverages (Pvt.) Limited v. Pepsico Inc. and 4 others (2004 CLD 1530) have been cited for the proposition that where a party claims compensation as alternative relief it would be tantamount to admitting that the party would not suffer any irreparable loss in case of refusal to grant injunction and it will be assumed in such case that the claimant can be made whole by payment of compensation. But the august Supreme Court laid down no such absolute rule in Puri Terminal or Bolan Beverages.

5. In Puri Terminal the subject-matter was the procurement of a Built-Operate-Transfer contract. Alleging malafide in the award of contract to another party, the petitioner sought specific performance of the contract along with seeking a declaration, compensation, damages and injunction before the High Court. A Judge-in-Chambers refused to confirm the injunction initially granted and a division bench of the learned Sindh High Court also refused to grant injunction. Discussing the details of the case, the august Supreme Court upheld the concurrent orders challenged before it as it did not find that the petitioner had made out a prima facie case. The apex Court also observed that, *"[I]t is pertinent to note that the petitioner irrespective of seeking declaration, permanent injunction, compensation also claimed damages as an alternative relief. By claiming damages as an alternative relief, the petitioner seemed to be not confident about the grant of other relief. Section 56 of the Specific Relief Act, stipulates that an injunction cannot be granted in the cases where an interference is sought in the functions of public duties of any*

department of the Federal Government or any Provincial Government or with the sovereign acts of a foreign Government. Though it was a service matter yet this Court in the case of Province of West Pakistan through the Deputy Commissioner, Hyderabad and another v. Malik Asghar Khan 1971 SCMR 569 held that issuance of temporary injunction against the Government departments in respect of service matters is bound to disturb their working and they should not ordinarily be issued unless there are compelling reasons to do so because balance of convenience ordinarily would not lie in disturbing the administrative arrangements of a department. On the question of any irreparable injury, it has also been observed that respondent on refusal of temporary injunction can claim a monetary compensation in case he succeeds in the suit. To further fortify, it would be relevant to refer the case of Ghulam Nabi and others v. Seth Muhammad Yaqub and others PLD 1983 SC 344 wherein this Court has observed that in view of provisions of section 56(1), no injunction should be granted when equally efficacious relief can certainly be obtained by any usual mode of proceedings. Since the petitioner has claimed compensation/damages as an alternative relief in the suit, as such, the above principle is fully attracted in the instant case." In Puri Terminal the petitioner was arguing that grant of the contract for construction of a Project by a public authority to another company was illegal and sought an injunction against the grant. And thus, in view of the fact of the case, the august Supreme Court held that denial of injunctive relief by the Sindh High Court did not suffer from any infirmity as in the event that the petitioner prevailed in its suit, grant of

monetary compensation, in that case, would be equally efficacious relief.

6. In Bolan Beverages, Pepsico Inc. had cancelled an agreement appointing Bolan Beverages (Pvt.) Limited as the bottler and distributor of Pepsico Inc.'s products in Balochistan such as Pepsi Cola etc., and Bolan Beverages sought an injunction pending adjudication of the suit challenging such termination. One of the arguments made by the counsel for Pepsico opposing the grant of injunction was that Pepsico had already revoked the franchise agreement and stopped the sale of concentrate to Bolan Beverages and the grant of injunction would force a revoked contract upon Pepsico. It was in view of the peculiar facts of the case that the august Supreme Court held that the loss to be suffered by the appellant could not be regarded as irreparable loss in the following terms:

> *"Mr. Khalid Anwar, learned Advocate Supreme Court placed reliance on section 21(a) of the Specific Relief Act, which provides that the contract for the non-performance of which compensation in money is an adequate relief, cannot be specifically enforced. He added that in the instant case the Bolan Bottlers have claimed a money decree of an exorbitant amount which shows that if decreed, the non-performance of contract shall stand compensated in terms of money and this being an adequate relief, it was never a fit case for the grant of temporary injunction. There is no cavil with the proposition that money reliefs like claim of compensation and damages are brought about by the plaintiffs mostly to avoid the mischief of Order II, rule 2 of the C.P.C. yet the calculation of such amount and the claim thereof would automatically give an impression that such loss or damage is reparable in terms of money. We agree with the learned counsel and believe that, in the circumstances of the present case, the loss cannot be*

> *irreparable in case the decree for compensation and damages etc. As claimed by the plaintiff is ultimately granted.*

The ratio of Bolan Beverages is not that in every case of calculation of damages by a claimant it must be concluded that the damage is reparable in the terms of money. Bolan Beverages only lays down a general guideline for regulating the exercise of discretion in injunction matters, where in the facts and circumstances of the case the claimant is unlikely to suffer irreparable loss, which sense is further buttressed by the fact that the claimant has also put a monetary value to the loss he believes he will suffer. But in Bolan Beverages the august Supreme Court explicitly acknowledges that it is Order II Rule 2 of CPC which explains why compensation and damages are sought as alternate relief in suits for specific performance.

7. Neither Puri Terminal nor Bolan Beverages lays down a plain rule that whenever a party seeks compensation or damages as alternative relief, it must be treated as proof of lack of irreparable loss. Such interpretation would be contrary to the dicta in Ghulam Nabi v. Seth Muhamad Yaqub (PLD 1983 SC 344) that Puri Terminal relied upon and also the dicta in other cases discussed later in this judgment.

8. Ghulam Nabi Vs. Seth Muhammad Yaqub (PLD 1983 SC 344) involved specific performance of a contract for sale of property, wherein the petitioner has previously filed a suit for injunction, that had been withdrawn, and most of the discussion in the judgment related to non-application of res judicata and the bar in the Order II Rule 2 of CPC. The apex Court held that *"a*

relief of injunction as claimed in the first suit could not be granted in a matter of breach of contract and specific performance being the proper and equally efficacious relief, the first suit was hit by provisions of Section 56(i) of the Specific Relief Act." The Court cited with approval dicta from *Sardar Vial Vs. Hirde Nath (AIR 1925 Lah. 459(2)), wherein it was held that:*

> *"The usual mode of proceeding on breach of a contract for sale of lands is to bring a suit for specific performance of the contract. The plaintiff, therefore, was not entitled to two reliefs in breach of a contract one by way of injunction and the other by specific performance. He was entitled only to the one relief, namely, a suit for specific performance, in which he could have added a claim for compensation: Order XI, Rule II, therefore, is no bar to the present suit."*

The ratio in *Ghulam Nabi* thus was that where the appropriate remedy was a suit for specific performance and a plaintiff initially filed a suit for injunction, which he then withdrew for it being barred by Section 56(i) of Specific Relief Act, the subsequent suit for specific performance would not be barred under Section 11 of CPC or Order II Rule 2.

9. In Barkat Ullah Vs. Wali Muhammad (1994 SCMR 1737) the petitioner argued that the respondent had asked for compensation in the event that specific performance was not granted and this was a basis for rejecting the relief of specific performance. The august Supreme Court held that, *"we find little merit in this contention. It is usual for parties seeking specific performance of an agreement for the sale of land to pray in the alternative for the relief of compensation. But then, the mere fact that a party has asked for compensation as an alternative relief*

does not imply that it no longer insists upon the specific performance of the agreement." It relied on Abdul Karim v. Muhammad Shafi (1973 SCMR 225) wherein it was held that:

> *"Section 20 says that a contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same. Section 22 provides that 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 connection by a court of appeal. The aforesaid provisions thus clearly empower the court to decree a specific performance of the contract even though a sum be named in the contract as the amount to be paid in case of its breach."*

10. In Liaqat Ali Khan vs. Falak Sher (PLD 2014 SC 506), it was reiterated that the relief of specific performance of an agreement was purely discretionary in nature and exercise of discretion in this regard was to be based on sound and reasonable analysis of the relevant facts of each case, particularly the terms of agreement between the parties, their subsequent conduct and surrounding circumstances etc.

11. Let us also consider dicta from a few judgments of High Courts that suggest that an alternate prayer for damages cannot be deemed to be a concession that the claim is not specifically enforceable.

i. *Sakina Bai v. Kurnool Muhammad Bashir (PLD 1967 Sindh 158)*

"15. Counsel argued that reading section, 21(a) and section 12(c) together, the conclusion at which one arrives is that granting the relief of specific performance is a discretionary matter with the Court and that the discretion is to be exercised against granting specific performance if it is found that pecuniary compensation can afford adequate relief to the claimant.

16. Mr. Zari interpreted the above-quoted portion of the notice, marked J, as sufficient to create estoppel against the plaintiffs against giving up that position and claiming specific performance.

17. He was right to the extent that specific performance is a discretionary relief, but he did not appear to advance a sound view of the provision of law when he contended that the mere fact of a party's willingness to accept compensation in the event of the failure of the opposite-party to perform its part of the contract, is sufficient to establish the allegation of fact that compensation in money is actually an adequate relief. The word of clause (a) of section 21 do not refer to the views of any one party but lay down, for adjudication, the consideration whether compensation in money is or is not an adequate relief. This aspect of the matter becomes clearer if we look at section 20 of the Specific Relief Act, which is as follows:

"A contract, otherwise 'proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same."

The above section has the following illustration:
"A contracts to grant B an under-lease of property held by A, under C and that he will apply to C for a license necessary to the validity of the under-lease, and that, if the licence is not procured A will pay B Rs. 10,000. A refused to apply for the licence and offers to pay B Rs.

10,000. B is nevertheless entitled to have the contract specially enforced if C consents to give the licence."

18. The conclusion to which the discussion leads is that the Court itself has to determine whether compensation in money is an adequate relief in a case like this or not."

ii. *In Hakim Ghulam Rasool v. Sh. Imdad Hussain (PLD 1968 Lah. 501) the following was held*:

"7. It was next contended on behalf of the respondent that the compensation in money furnished an adequate relief to the appellant and, therefore, he was not entitled to a decree for the specific performance of the contract. Under section 12 of the Act, "unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money." This rule would prima facie apply here but it is argued that, as there is a condition in the contract for the payment of damages in default of performance, whether by the vendor or by the vendee, it must be held that the parties considered that the enforcement of these damages would be adequate in case the contract is not performed. In section 20 of the Specific Relief Act it is provided: "A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same. This is further explained by illustration to section 20 which reads: "A contracts to grant B an under-lease property held by A under C, and that he will apply to C for a licence necessary to the validity of the under-lease, and that, if the licence is not procured. A will pay Rs. 10,000.00. A refuses to apply for the licence and offers to pay B Rs. 1 0,000.00. B is nevertheless entitled to have the contract specifically enforced if C consents to give licence." In Ranger v. Great Western Railway Co. (5 H L C 94), Lord Granworth explained: "A Court of Equity is in general anxious to treat the penalty as being merely

a mode of securing the due performance of the act contracted to be done, and not as a sum of money really intended to be paid." Halsbury has expressed the rule thus: "Where the contract contains a stipulation that in the event of non performance a certain sum of money shall be paid, that fact is not in itself decisive in considering whether or not specific performance should be granted. Nor does the distinction between penalty and liquidated damages affect the answer to this question. The answer is to be found by considering the intention of the parties, that is, whether the party bound to performance has an alternative choice given to him by the contract to perform or to pay the agreed sum, or whether he is bound to do a certain thing, with a penal sum or sum by way of liquidated damages attached as security. In the latter case the Court, notwithstanding the penal clause, enforces performance, if the contract be such that without the penal clause it would have been proper for specific performance. Whether the contract contains a penalty clause, the contracts has his right in law upon the contract for the money payable under the clause, and also his right in equity to specific relief; he can, at his election, obtain either form of relief, but he cannot obtain both forms…The general rule of equity is that if a thing is agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done."

iii. *Mian Kaman Ilahi v. Digiri Sugar Mills Limited (2014 CLD 1583)*

"15. As regards the other contention of the learned counsel for the defendants that plaintiffs apart from relief of specific performance of the agreements have also claimed damages to the tune of Rs.1,000,000,000. Since damages have been calculated specific performance of the agreements would not be granted. Likewise, when a specified sum of damages has been claimed, one of the necessary ingredients for grant of interim injunction vis-a-vis irreparable loss likely to be suffered by the plaintiff is missing, the injunction could not be granted. I do not

agree with the contention of defendants' counsel, that since the plaintiffs have claimed damages, no relief by way of temporary injunction could be granted. Under Rule 2 of Order XXXIX of C.P.C., the plaintiffs can apply to the Court for a temporary injunction, to restrain the defendants from committing breach of contract whether compensation is claimed in the suit or not. The damages claimed by the plaintiffs are in addition to the relief of specific performance and is not claimed as an alternative relief. The loss or injury which the plaintiffs would suffer in case the defendants commit breach of agreement, in my view, cannot be calculated and the proper course would be to restrain the defendants from committing breach of contract pending decision of suit. The balance of convenience in the instant case in such circumstances also lies in favour of plaintiffs. Moreover, under Order II, Rule 2, C.P.C. a plaintiff should ask for all possible remedies within one civil suit, as the same is barred from filing an independent case for seeking a different remedy for the same cause of action. As such, seeking damages as an alternative prayer cannot bar the plaintiffs from seeking specific performance."

12. Section 12 of the Act states the following:

***12. Cases in which specific performance enforceable**. Except as otherwise provided in this Chapter, the specific performance of any contract may in the discretion of the Court be enforced—*

(a) when the act agreed to be done is in the performance, wholly or partly, of a trust;

(b) when 1 [their] exists no standard for ascertaining the actual damage caused by nonperformance of the act agreed to be done;

(c) when the act agreed to be done is such that pecuniary compensation for its nonperformance would not afford adequate relief; or

(d) when it is probable that pecuniary compensation cannot be got for the nonperformance of the act agreed to be done.

The following has been provided as an illustration of clause (b):-

> *"A agrees to buy, and B agrees to sell, a picture by a dead painter and two rare China vases. A may compel B specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance."*

It was also held by the learned Sindh High Court in Arif Shah v. Abdul Hakim (PLD 1986 Karachi 189) that specific performance of a contract cannot be refused merely because a certain amount has been named in the contract to be paid as damages for breach of the contract.

13. It will also be beneficial to reproduce sections 20, 21 and 22 of the Act.

> ***20. Liquidation of damages not a bar to specific performance****. A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.*
>
> ***21. Contracts not specifically enforceable****. The following contracts cannot be specifically enforced: –*
>
> *(a) a contract for the nonperformance of which compensation in money is an adequate relief;*
>
> *(b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;*
>
> *(c) a contract the terms of which the Court cannot find with reasonable certainty;*
>
> *(d) contract which is in its nature revocable;*
>
> *(e) a contract made by trustees either in excess of their powers or in breach of their trust;*

(f) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers;

(g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date;

(h) a contract of which a material part of the subject matter, supposed by both parties to exist, has, before it has been made, ceased to exist.

And, save as provided by the Arbitration Act, 1940 (X of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract other than an arbitration agreement to which the provisions of the said Act apply and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

***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. 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.

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its nonperformance would involve no such hardship on the plaintiff.

III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

14. Order II Rule 2 of CPC states the following:

> ***2. Suit to include the whole claim***.__ *(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.*
>
> *(2) Relinquishment of part of claim. Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*
>
> *(3) Omission to sue for one of several reliefs. A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs ; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.*

15. A consequence of holding that in case of a party seeking compensation or damages as an alternative remedy it cannot be granted interim injunction (in relation to contracts involving movable property at least) would be to produce multiplicity of proceedings at best, or worse, frustrate the ability of the claimant to seek specific enforcement after trial. If the party makes out a prima facie case but is denied interim relief on the basis of it seeking the alternative relief of compensation or damages, the lis would not remain preserved and it might become impossible to specifically enforce the contract in question at the time of judgment. Further, in the event that the suit property changes hands, the refusal to grant injunction and preserve the status of the lis would result in multiplicity of proceedings. Such interpretation of section 56(i) of the Act would force parties not to claim compensation or damages in the alternative to avoid any mischief caused due to the existence of section 56(i) and bring a suit for damages subsequently if the court finds that specific

performance cannot be granted. And this could possibly attract the bar in Order II Rule 2 of CPC. In a case of breach of contract, a party can have the right to enforce its performance while also seeking damages for breach of obligations by the counter-party that has already taken place. It is also logical for a party to claim damages as an alternative in case specific performance cannot be ordered in the circumstances of the case due to impossibility or any other factor. The action of the claimant in seeking an alternate remedy from court in terms of compensation does not mean that such compensation will make the claimant whole, affect restitution and amount to ascertainment of actual damage caused due to non-performance of contract for purpose of section 12(b) of the Act. A person seeking to enforce a contract for sale of a rare painting, for example, by an artist who has passed might ask for compensation in the alternative. But such alternate relief, which can be awarded if the painting is lost or destroyed etc., cannot be seen as ascertainment of the actual damage caused due to non-performance. The grant of compensation in such case would amount to compensation but not restitution.

16. Let us reproduce some dicta from courts dilating on the bar in Order II Rule 2 of CPC:

(i) Abdul Hakim and 2 others v. Saadullah Khan and 2 others (PLD 1970 SC 63)

"*The expression "cause of action" in Order II, rule 2, CPC means the cause of action for which a suit is brought. In order that the cause of action for the two suits may be the same, it is necessary not only that the facts which would entitle the plaintiff to the right claimed must be the same but also that the infringement of his right at the hands of the defendants complainer against in the two*

suits, must have arisen in substance out of the same transaction. In considering the application of this bar, regard is to be had to the allegations in the two suits without reference to the defence that may be set up by the defendants. A rough test, although not a conclusive one, is to see whether the same evidence will sustain both suits which would be the case if both the suits are founded on continuous and inseparable incidents in the same transaction. The question, however, is to be examined in substance and not merely on form as the cause of action in the two suits may be found to be the same, in spite of the facts alleged not being exactly identical in the two cases. It is not open to the plaintiff to split up the parts really constituting the same cause of action and file different suits in respect of them. In other words, a plaintiff must ask for all his reliefs which flow from the grievances caused to him by the infringement of his rights by the defendant in the course of the same transaction, but he cannot and is under no obligation to add to his grievances which did not occur in that transaction. If two trespasses are alleged against a defendant, both in the course of the same transaction, a plaintiff must seek his remedy in one suit against both and he cannot split up his cause of action to sue for one trespass in one suit and for the other in a subsequent suit. But where the two trespasses allegedly have taken place on different occasions and the second was not in existence at the time of the first suit, there could neither be any occasion nor any necessity for the plaintiff to seek his redress for the second trespass in the first suit. In the latter circumstances a second suit would not be barred under Order II, rule 2 of the Civil Procedure Code."

(ii) M.K Abbasi v. United Bank Ltd. (1983 CLC 482 Karachi).

"Order II, rule 2, C. P. C. provides that if the plaintiff omits to sue for all the claims and reliefs to which he is entitled on a cause of action then the plaintiff would not be entitled afterwards to sue in respect of the portion of claim so omitted or relinquished. But where the plaintiff is entitled to more than one relief in respect of the cause of

action and fails to seek all the reliefs then he can ask for it only with leave of the Court. The provisions of Order II, rule 2 therefore clearly distinguish between claim and relief. A claim once omitted or relinquished cannot be made subject-matter of a subsequent suit on the same cause of action. In case a relief is omitted the plaintiff would be precluded from afterwards suing for any relief so omitted. However, Order II, rule 2(3) provides an exception and if the omission is with the leave of the Court then this bar will not apply. The bar provided by Order II, rule 2 shall apply where the previous and subsequent suits are based on the same cause of action. Reference can be made to Muhammad Khalil Khan and others v. Mahbub Ali Mian and others (PLD 1948 PC 131), Abdul Hakim v. Saadullah Khan (PLD 1970 SC 63) and AIR 1935 Lah. 672. Another condition for applicability of Order II, rule 2, CPC as held in PLD 1970 S C 63 is that in both the suits the parties should be same. It is thus well-settled that the law does not permit splitting of claim arising out of the same cause of action, as a party cannot be vexed twice for the same cause and it will avoid multiplicity of suits."

(iii) Jubilee General Insurance Co. Ltd. Karachi v. Ravi Steel Company, Lahore (PLD 2020 SC 324).

"Indeed, in adversarial proceedings a litigant has to cross the barrier of limitation, before his rights are adjudicated. Like Order II Rule 2 CPC mandates the Plaintiff to include the whole claim and seek all reliefs in a suit to which he is entitled, where a plaintiff omits to sue in respect of the portion so omitted to claim any relief to which he may be entitled, he cannot, except by leave of the Court, afterwards sue for any relief so omitted."

In other words, if a claimant doesn't seek the relief of compensation and damages in a suit for specific performance, and specific performance is not ordered in the suit or cannot be ordered, the claimant would have to bring a further action, subject to the permission of the court, to claim the relief of compensation.

There seems no rational basis to interpret provisions of the Act such that a complainant is forced to bring a second action only to seek a different relief i.e. compensation, that emanates from the same claim on the basis of which specific performance was sought.

17. In view of the provisions of the Act and the caselaw cited above the following can be discerned:

i. For injunctive relief to be granted in relation to a suit for specific performance of a contract, the contract must fall within the scope of section 12 and relief must not be barred by virtue of section 21 read with section 56, and grant of interim injunction must otherwise be due in view of settled principles for grant of interim relief;

ii. A prayer seeking compensation and damages as alternative relief in a suit for specific performance does not automatically attract the bar in section 56(i) of the Act and cannot be treated as ascertainment of actual damages caused due to non-performance of contract for purposes of section 12(b) leading the court to conclude that the claimant has conceded that he will suffer no irreparable loss due to non-performance of the contract;

iii. When the estimate of damages provided within the contract as a measure of loss inflicted on the non-breaching party does not qualify as ascertainment of actual damage caused by non-performance or result in denial of a claim for specific performance, a claimant’s alternative claim for compensation that he will accept if he must cannot be deemed as ascertainment of actual damage caused by non-performance;

iv. Prayer for compensation or damages as alternate relief in a suit for specific performance is not in itself

conclusive of the fact that the third component of the test for grant of injunction in Shahzada Muhammad Umar Beg V. Sultan Mahmood Khan and another (PLD 1970 SC 139) i.e. irreparable loss, is altogether absent and request for injunction cannot be denied on this basis alone;

v. It is for the court to determine in the facts and circumstances of each case as to whether the contract is such that is specifically enforceable, and the terms of the contract and conduct of the parties in relation to the contract and their understanding of the nature of rights and liabilities the contract creates as well as the consequences of its breach, including, inter alia, whether such breach will cause irreparable loss, are all factors to be considered by the court. But the ultimate responsibility of determining whether or not the breach of the contract in question will in effect result in irreparable loss rests with the court and is to be determined through application of mind in view of the facts before it; and

vi. Determination of whether or not injunctive relief is to be granted is a discretionary matter for the court, in view of section 22 of the Act, and such exercise of discretion is guided by the facts and circumstances of each case and the conduct of parties, with the court being mindful that it is to exercise discretion only when just and proper to do so and not in the aid of injustice.

18. Let us consider the concept of repudiation, recission and anticipatory breach. The appellant has argued that the respondent had terminated the contract and he can make no claim under it. It is well-settled that where a contract involves two parties, one party cannot singlehandedly determine the contract. In *Contract Cases*

and Materials by HG Beale, WD Bishop and MF Furmston (Butterworth, 3rd Edition, PP 728), recession is explained as a situation "*where each party releases the other from liability to perform his outstanding obligations under the contract. Sometimes recession involves each party returning benefits received under the contract, but an agreement simply to release outstanding obligations is called 'abandonment'. Recession and abandonment require agreement and consideration or a deed*." Beale, Bishop & Furmston argue (pp 514, ibid) that, "*the victim of an anticipatory breach does not have to 'accept the repudiation' by terminating the contract: he or she may wait and see whether the repudiating party will perform when the time comes. If, however, the contract is left in force, the fact that there has been a repudiation is for many purposes ignored. Thus, firstly, the victim must normally tender his performance when the time comes, giving the party who repudiated the right to terminate. The only exception is if the repudiating party made it clear that it has no interest in receiving performance and the victim accordingly doesn't tender it: then the repudiating party would be stopped from complaining: Fercometal SARL Vs. Mediterranean Shipping Co SA (1988) 2 ALL ER 142, HL*." And that "*a second consequence of leaving the contract in force is that the repudiating party can take advantage of any subsequent circumstances that may arise to excuse him*."

19. It has been stated by G.H. Treitel in the *Law of Contract* (Sweet & Maxell, 9th Edition, PP 757) that "*a breach which justifies recession does not automatically determine the contract. It only gives the victim the option rescinds the contract or to affirm it to*

claim further performance." And further that, "*the question whether the option to rescind has been exercised has been described as one of the fact [Kish Vs. Taylor (1912) A.C. 604, 617]; but this description assumes that a number of legal requirement have been satisfied. Some conduct indicating the exercise of the option seems to be necessary, so the mere "silence and inactivity" has been said not to suffice [State Trading Corp of India Vs. M. Golodetz Ltd. (1989) 2 Lloyd's Pep 277, 286]*."

20. Treitel states (ibid, pp 769) that "*an anticipatory breach is said to occur when, before performance is due, a party either renounces the contract or disables himself from performance it… Where one party has committed an anticipatory breach, the other has a choice. He can try to keep the contract alive by continuing to press for performance, in which case the anticipatory breach will have the same effects as an actual breach. Alternatively, he can "accept" the breach, in which case his rights to damages and recession are governed by special rules*…" He further states that, "*if the injured party does not accept the breach, he remains liable to perform, and he retains the right to accept the other party's primary obligations. As a practical matter, he also keeps alive the possibility of securing actual performance of the contract without legal action… A party who does not accept the breach cannot at common law get damages before the time fixed for performance; and meanwhile he runs the risk of losing his right of action altogether… The injured party will similarly lose his rights in respect of the anticipatory breach if he does not accept it and if, before performance from the guilty party has become due, the*

party withdraws his repudiation [Harrison v. Northwest Halt Group Administration [1985] I.C.R. 668] or lawfully puts an end to the contract e.g. under an express cancellation clause [The Semiona [1989] A.C 788].”

21. It was held in AIR 1928 Sind 103 that if repudiation of a contract before the arrival of its time of performance is not accepted by the other party, the contract remains alive and cannot be treated as determined due to anticipatory breach. It has been stated by M. Mahmood in Contract Act, 1872 (Al-Qanoon Publishers, 1st Dd, pp 523) that, “*a wrongful repudiation in the absence of election by the other party leaves both of them with their rights and liabilities as if no repudiation has taken place*.” It was held in A.C Yusuf & Co. Vs. K.B.H. M. Habibullah & Co. (PLD 1965 Karachi 374) that if the non-repudiation party still insists on performance of the contracts, the parties are left with their rights and liabilities as before and that if no notice of cancellation is given to the other party, the breach is condoned and the contract continues. The learned Sindh High Court observed the following:

> *16. It is indisputably clear from the correspondence that the defendants had, notwithstanding the repudiation of the contract, by the plaintiffs, treated the contract as subsisting and had not elected to rescind it. The law seems to be clear that a wrongful repudiation in the absence of election by the other party leaves both of them with their rights and liabilities as if no repudiation has taken place. This applies in cases of anticipatory breach. The general principle is contained in section 39 of the Contract Act and section 60 of the Sale of Goods Act deals with the same particular reference to cases of sale of goods.*
>
> > *"60. Where either party to a contract of sale repudiates the contract before the date of delivery, the other party may either treat the contract as subsisting and wait till the*

> *date of delivery, or he may treat the contract as rescinded and sue for damages for the breach."*
>
> *An extremely lucid exposition of the consequences of non-acceptance of anticipatory breach was given by Cockburn, C. J., in the case of Frost v. Knight (L R 5 Ex. 322). This is what the learned Judge said:*
>
> > *"The promisee, if he pleases may treat the notice of intention as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own, he remains subject to all his own obligations and liabilities under it, and enables the other party not to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it."*

22. In the instant appeal it is the respondent's case that the appellant breached the contract and repudiated it when it did not transmit the 50% advance for the vehicle received from the respondent to Porsche AG after receiving it on 03.04.2018, and thus failed to reserve a slot within the production time in breach of the Contract; and further when the appellant failed to intimate the respondent that production had been confirmed by Porsche AG upon receipt of booking amount under clause 23 of the contract and when it failed to provide production confirmation letter under clause 29 of the contract, tentative Production Schedule Confirmation under clause 32 of the contract; and when it failed to provide intimation of production completion triggering the respondent's obligation to pay 30% of balance consideration and the shipment confirmation triggering his obligation to pay the remaining 20% of the consideration under clause 17 of the

contract; and when it failed to share the bill of lading for shipment under clause 37 of the contract and delivering the vehicle in accordance with the tentative delivery schedule of six months from the booking and payment of 50% advance under clause 35 of the Contract.

23. Admittedly, the respondent paid 50% of the price of the vehicle on 03.04.2018 and the appellant still holds such amount. It is asserted by the appellant that the respondent attempted to repudiate the contract on 21.12.2018 and then subsequently on 15.01.2019 by communicating to the appellant that it did not wish to receive the vehicle and sought the return of the advance paid in lieu of the Contract. The last communication by the appellant in this regard that it has placed on record is an email dated 24.12.2018. It states that despite the back and forth, the respondent had confirmed its desire to go ahead with the order for the vehicle on 08.10.2018 and that the order had been placed with Porsche AG (production of the vehicle in February 2019 had been confirmed by an earlier email dated 12.12.2018) and that, "*in light of the foregoing, if you want to proceed for cancellation once again than kindly refer to cancellation clauses (once the quota allocation is secured) of terms and conditions of signed vehicle order agreement.*" Clause 54 of the contract states that in the event of cancellation of the order after quota allocation, 50% of the advance paid would be forfeited. In other words, the appellant did not accept the repudiation of the contract and did not rescind the Contract. It sought to enforce the contract and left it for the respondent to determine of it still wished to cancel the order

subject to forfeiture of 50% of the $195,075 paid as advance for the booking or to continue with the Contract.

24. The respondent then filed a consumer complaint dated 25.02.2019 under the Islamabad Consumers Protection Act, 1995, alleging breach of contract by the appellant and seeking recovery of the 50% advance paid together with compensation and damages. The appellant's position before the learned consumer court was not that the contract had already been rescinded, but that the complaint could not be adjudicated by the Consumer Court on jurisdictional grounds and that the appellant was not in breach of its obligation under the contract. In its order dated 04.02.2020, the learned Consumer Court held that it lacked jurisdictional to entertain the complaint and that the complaint was not maintainable. The respondent then served a legal notice dated 09.04.2020 on the appellant and Porsche AG holding them liable for breach of the contract and communicated his intention to initiate legal proceedings, after which the suit for specific performance, damages and compensation was filed resulting in the instant appeal.

25. While the matter was pending before the learned Consumer Court, the Vehicle ordered pursuant to the Contract was delivered in Pakistan on 17.06.2019. This development was, however, not shared by the appellant with the respondent or with the Consumer Court. By Vehicle Order Agreement dated 07.09.2019 the appellant entered into a sale transaction with a third party in relation to the Vehicle delivered pursuant to the Contract with the respondent. The customized vehicle ordered by

the respondent on 02.04.2018, for a price of $398,845.00, which was meant to be delivered in six months, had finally arrived on 07.06.2019 and was sold to another customer for a price of $534,729.00.

26. The learned counsel for the appellant confirmed in response to this Court's question that the Vehicle in-question is the same customized Vehicle ordered by the respondent. Further, the learned counsel for the appellant from the plethora of correspondence between the parties was not able to point to a single document conveying to the appellant that it had accepted the respondent's repudiation or abandonment or termination of the Contract and consequently the Contract stood determined. The documents and correspondence relied upon by the appellant conversely suggest that the appellant continued to insist on the performance of the Contract and later offered to process cancellation of the order for the Vehicle under clause 54 of the Contract, should the respondent so wish, which would penalize the respondent for such cancellation. In other words, the contract was never terminated by the appellant. The appellant only offered to terminate the Contract subject to forfeiture of the deposit to the extent of 50%, which offer wasn't accepted by the respondent. Thus, neither was termination ever processed nor was the Contract between the parties altered. The learned counsel for the appellant confirmed that the appellant still holds onto the $195,075 paid by the respondent as 50% advance for the Vehicle.

27. It is the respondent's case that the appellant breached the Contract and despite his efforts to seek amicable resolution

through return of the 50% deposit paid in face of continuing breach of the Contract by the appellant, the appellant did not agree and sought to enforce the Contract against the respondent. And further that the respondent has never been delinquent in relation to his obligations under the contract as after payment of 50% advance it continued to press the appellant to uphold its end of the bargain, which it did not do. The appellant failed to place the order with Porsche AG in time leading to delay in issuance of production schedule and delivery of the Vehicle. And even once the Vehicle was produced and shipped, such facts were not communicated to the respondent, upon communication of which his obligation to pay the balance consideration would mature. Therefore, the respondent never reneged on any obligation under the Contract and it was the appellant who breached it all along and eventually sought to sell the customized vehicle ordered by the respondent to another customer for a significantly higher price, while retaining the deposit paid by the respondent. And as the Contract has remained in the field all along, the respondent sought to enforce it specifically once he became aware that the Vehicle he had ordered had arrived in Pakistan.

28. While hearing this appeal, this Court can only form tentative view of the matter in order not to prejudice the interests of the parties in the suit. From the correspondence produced by the appellant it seems that notwithstanding the alleged repudiation of the Contract by the respondent, the appellant continued to treat the Contract as subsisting and not only did it never elect to rescind it, it also sought to enforce the terms of the

Contract against the respondent. As has been clarified through the caselaw on the question of repudiation, rescission and termination on the basis of anticipatory breach, the non-breaching party has the right to make a choice in face of repudiation by the other party: it can determine the contract and sue for damages for breach; or it can insist on performance of the contract by keeping it alive. If it makes the latter election, the contract stays in the field and continues to preserve the rights and obligations of both parties to the contract with all attendant consequences. And consequently, the party claiming repudiation remains equally bound by the contract when it elects not to resend it. In a nut shell, the party claiming repudiation by the counter-party cannot have its cake and eat it too. In the instant matter, the appellant, prima facie, did not resend the contract, which remains in the field and binds both, the appellant and the respondent.

29. The matter relates to the customized Vehicle ordered by the respondent and the model of the Vehicle is not in production any more. No infirmity has been pointed out by the learned counsel for the appellant in the impugned order in which the learned trial court has reasoned that as the Vehicle has been specially customized for the respondent, monitory compensation in lieu of it would not be adequate compensation, after finding that the respondent has made out a prima facie case.

30. It has been discussed earlier in this judgment that seeking the relief of damages and compensation as an alternative relief is not in itself conclusive of whether the loss claimed by the claimant is reparable through a monitory award. In this case, the learned

trial court, while exercising its discretion to grant injunctive relief, has been influenced by the fact that even with monitory relief the respondent would be unable to order and procure the Vehicle as such model in question is no longer in production. There is no irrationality afflicting the reasoning of the learned Civil Court.

31. Further, the conduct of the appellant is also relevant as it comes before this Court seeking discretionary relief. While this court would refrain from making any observations that could prejudice the appellant's case in trial, suffice it to say that holding on to a substantial amount of deposit from one customer, while refusing to refund it or process termination of the order in face of delays in delivery, and then selling it to another customer at a much higher price and accepting his deposit as well, while the dispute with the first customer has already matured, is not the kind of behavior that seems endearing from the perspective of equity.

32. This appeal is **dismissed** with a cost of Rs.25,000/- imposed under section 35(1)(iii) of CPC payable by the appellant to respondent No.1 within 15 days.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 04.05.2021.

JUDGE

Approved for reporting.

Saeed.