JUDGEMENT SHEE

IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Regular First Appeal No. 362/2021

Aamir Shahzad Khan
Vs.
Muhammad Sabir

APPELLANT BY:	Mr. Muhammad Anwar Dar and Mr. Sammar Anwar Dar, Advocates.
RESPONDENT BY:	Mr. Sajjad Haider Malik and Ms. Ambreen Anwer, Advocates. Mr. Tariq Mehmood Qureshi, Advocate for respondent No.3 in R.F.A No.368/2021.
DATE OF HEARING:	26.04.2023.

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BABAR SATTAR, J.- Through this judgment the appeals listed in Annexure-A will be decided as the subject matter as well as the underlying factual matrix in these appeals is the same.

2. There were agreements for sale of apartments in *Khudadad* Heights, E-11, Islamabad, dated 19.04.2004 ***("Sale Agreement")***, entered into by the appellant (Aamir Shahzad Khan) who will be referred to as ***"Seller"*** with the respondents in these appeals (who are the appellants in RFA Nos 373,374 and 376 of 2021) who will be referred to as ***"Buyers"***.(While the underlying analysis and outcome don't change for purposes of discussion in this judgment the particular facts used are those related to RFA No. 362 of 2021) The Buyers sought specific performance of the Sale Agreement pursuant to which apartments ***("Property")*** were to be constructed as part of a

development project *Khudadad* Heights, E-11, Islamabad***("Project").*** The Property was sold to the Buyer against the sale consideration in the amount of Rs.2,225,000/-. The Buyer paid down-payment in the amount of Rs.556,250/- and started making payments in lieu of the remaining sale consideration as installments according to the schedule included in the Sale Agreement. Possession of the Property was to be delivered on 31.12.2006 and the installments schedule prescribed that the final payment of sale consideration was to be made on 31.03.2007. The Buyers refused to pay some of the installments due in the later part of 2006. The Seller was unable to complete the construction and development of the Project and deliver possession on 31.12.2006. A dispute arose when the Seller claimed payments of the remaining sale consideration along with penalty. On 15.03.2012 the Seller issued a notice of readiness of the Property ***("Notice of Readiness")*** subject to payment of the remaining sale consideration and penalty. The Buyers responded by claiming that an amount was overdue to the Buyers under clause-18 of the Sale Agreement in lieu of rent as the Seller had delayed delivery by six years and consequently a payment was outstanding from the Seller to the Buyer along with delivery of possession. The Seller then cancelled the allotment of the Property by letter dated 08.05.2012 and the Buyers filed suits for specific performance of the Sale Agreement. The Civil Court dismissed the suits for specific performance filed by the Buyers and decreed the suit for cancellation of the Sale Agreement filed by the Seller.

3. In R.F.As No.372 to 377 of 2021 it is the Buyers who are the appellants and these appeals have not been pressed by the learned counsel for such Buyers on the basis that they would be satisfied if the decretal amount granted to them as return of consideration paid by them is upheld.

4. The Civil Court framed the following consolidated issues by order dated 26.10.2015:-

1. *Whether the plaintiff purchased the suit property i.e. flat no 508 exclusive 'A' against the sale consideration of Rs.2,225,000/- and paid installments and is entitled for declaration and performance of the same? OP Muhammad Sabir*
2. *Whether plaintiff fulfilled all the terms and conditions of the agreement and defendant failed to hand over the possession of the same well in time? OP Muhammad Sabir*
3. *If issue no 1 is approved in affirmative, then whether the plaintiff is entitled for recovery of Rs.1,125,000/- as outstanding rent mutually decided in the agreement? OP Muhammad Sabir*
4. *Whether the defendants were authorized to change the number and floor of apartment? OP Amir Shehzad & others*
5. *Whether the plaintiff Muhammad Sabir failed to pay the balance installments of the suit flat, therefore, his allotment is liable to be cancelled? OP Amir Shehzad & others*
6. *Whether the suit of Muhammad Sabir is not maintainable in its present form? OP Amir Shehzad & others*

7. *Whether the suit of Amir Shehzad is false, frivolous vexatious, hence liable to be dismissed with heavy costs? OP Muhammad Sabir*

8. *Relief.*

5. While the suits were disposed of through three separately written judgments, the judgments and reasoning of the Civil Court are identical and therefore this judgment need not be burdened by separate discussion of the said judgments, which have been challenged in the appeals which are being decided through this consolidated judgment. The Civil Court in relation to Issues No.1, 2 and 5 concluded that the Buyers had not paid the last two installments due before the date on which delivery of possession was due and had therefore defaulted on their obligation and were therefore not entitled to a decree of specific performance. It simultaneously held that the Seller had retained the sale consideration paid by the Buyers and had not returned the same at the time of cancellation of allotment of the Property or thereafter. The Buyers were therefore entitled to the return of three times the sale consideration paid by them. For purposes of convenience the number of installments paid, the total amount of sale consideration paid and the decretal amount awarded by the Civil Court to the Buyers in relation to each appeal are summarized in tabular form are reflected below:

Flat 508 in RFA No. 372 of 2021, RFA 362 of 2021 RFA 374 of 2021		
	Due Date	**Amount**
		556,250 (earnest money)
1-	**30-06-2004**	**139,062**
2-	**30-09-2004**	**139,062**
3-	**31-12-2004**	**139,062**
4-	**31-03-2005**	**139,062**
5-	**30-06-2005**	**139,062**

6-	**30-09-2005**	**139,062**
7-	**31-12-2005**	**139,062**
8-	**31-03-2006**	**139,062**
9-	**30-06-2006**	**Not paid**
10-	**30-09-2006**	**Not paid**
11-	**31-12-2006 (also date of possession)**	**Not paid**
12-	**31-03-2007**	**Not paid**
Total Sale Consideration: Rs 2,225,000		
Total Sale Consideration Paid: 1,668,746		
Decretal Amount: Rs 5,006,262		

Flat 506 in RFA 368 of 2021, RFA 375 of 2021, RFA 376 of 2021		
	Date	**Amount**
		556,250(earnest money)
1.	**30-06-2004**	**139,062**
2.	**30-09-2004**	**139,062**
3.	**31-12-2004**	**139,062**
4.	**31-03-2005**	**139,062**
5.	**30-06-2005**	**139,062**
6.	**30-09-2005**	**139,062**
7.	**31-12-2005**	**139,062**
8.	**31-03-2006**	**139,062**
9.	**30-06-2006**	**139,062**
10.	**30-09-2006**	**Not Paid**
11.	**31-12-2006 (also date of possession)**	**Not Paid**
12.	**31-03-2007**	**Not Paid**
Total Sale Consideration: Rs 2,225,000		
Total Sale Consideration Paid: 1,807,808		
Decretal Amount: Rs 5,423,451		

Flat 820 in RFA 369 of 202, RFA No. 373 of 2021, RFA 377 of 2021		
	Date	**Amount**
		556,250(earnest money)
1.	**30-06-2004**	**128,125**
2.	**30-09-2004**	**128,125**
3.	**31-12-2004**	**128,125**
4.	**31-03-2005**	**128,125**
5.	**30-06-2005**	**128,125**
6.	**30-09-2005**	**128,125**
7.	**31-12-2005**	**128,125**
8.	**31-03-2006**	**128,125**
9.	**30-06-2006**	**128,125**
10.	**30-09-2006**	**Not Paid**
11.	**31-12-2006 (also date of possession)**	**Not Paid**
12.	**31-03-2007**	**Not Paid**
Total Sale Consideration: Rs 2,050,000		
Total Sale Consideration Paid: 1,153,125		
Decretal Amount: Rs 4,996,875		

6. Issue No.3 was declared to be redundant. In relation to Issue No.4 the Civil Court found that the change in the number of the apartment and the floors on which they were located was a consequence of the recommendation by engineers after the earthquake in 2005. In relation to Issue No.6 the suits were found to be maintainable. And Issue No.7 as to whether the suits filed by the appellants were false and frivolous, was answered in the negative. As a consequence the suits for specific performance were dismissed and the suits for cancellation of the Sale Agreement were allowed and decreed subject to return to the Buyers of three times the sale consideration received by the Seller. The judgments and decrees have been impugned before this Court.

7. The learned counsel for the Seller sought the setting aside of the judgments and decrees to the extent that it enhanced threefold the amount to be returned by the Seller to the Buyers. The learned counsel for the Buyers submitted that the Sale Agreement was entered into in 2004 and almost two decades have passed since the execution of the Sale Agreement. He submitted that under instruction from the Buyers he was not seeking the setting aside of the judgments and decrees and was only seeking payment of the decretal amount as awarded to the Buyers by the impugned Judgments.

8. The learned counsel for the Seller argued his case on the basis of facts as reflected in R.F.A No.362 of 2021. He submitted that the Sale Agreement was terminated on 08.05.2012. The judgments and decrees suffer from infirmities

as the Civil Court found that the Buyers had defaulted on their obligations under the Sale Agreement. But the Civil Court misread the evidence and concluded that the Seller never offered a refund of the sale consideration. He submitted that cancellation letter dated 08.05.2012 provided that the Buyers may apply for a refund of the deposited amount in accordance with the terms of the Sale Agreement. He contended that it was for the Buyers to seek a refund from the Seller, which they never did and consequently, the Buyers were not entitled to be granted threetimes the sale consideration paid by them. He submitted that the schedule of installment payments that formed part of the Sale Agreement required all installments be paid up until 31.03.2007, which the Buyers admittedly failed to pay. They could therefore not claim market rent for delay in delivery of possession as such rent was payable to such buyers who had made installment payments in accordance with the Sale Agreement. He further submitted that clause-2 of the Sale Agreement provided that refund would be made after deduction of ten percent of the total price of the apartment at such time when the apartment was sold to a third party after completion of the project.

9. The learned counsel for the Buyers submitted that the execution of the Sale Agreement was admitted and so was the fact that possession of the Property was to be handed over on 31.12.2006 prior to payment of the entire sale consideration. He submitted that it was the Seller’s case that the Notice of Readiness of apartment seeking payment of balance consideration was issued on 15.03.2012, (exhibited as D/2 by

the Seller), which stated that the apartment was nearing completion and outstanding payments, excluded the last installment, be paid by 15.04.2012. This reflected that the Project and the Property were not completed by 15.03.2012, which is why even at such time the last installment, which under the Sale Agreement was due and payable after the delivery of the Property under the Sale Agreement, was not solicited by letter dated 15.03.2012. He submitted that DW-1 during his cross-examination had admitted that the Seller had not returned the sale consideration. And such admission had been noted by the Civil Court in its judgment. He submitted that the Buyers had been promised the delivery of the Property on 31.12.2006, at which time the second last installment payment was due, and the last installment payment was to be paid three months after delivery of possession of the Property. The Civil Court did not appreciate that the development of the Project had been delayed and there was no possibility of delivery of possession on 31.12.2006, which is why the Buyers withheld the counter obligation to make the last few installment payments, even though the Buyers had continued to make installment payments till the middle of 2006. It was only when it became evident that discharge of the Seller's obligation to deliver possession by 31.12.2006 had become an impossibility that the Buyers withheld their counter obligation to pay the remaining sale consideration. He submitted that even in response to the Notice of Readiness dated 15.03.2012, the Buyers by letter dated 21.03.2012 expressed their readiness and willingness to pay any amounts due, but made a counter-claim seeking payment of rent

from the scheduled date of delivery pursuant to clause-18 of the Sale Agreement. Thus, at no time did the Buyers refuse to abide by their obligations under the Sale Agreement. The only thing they sought was performance of counter obligations by the Seller and giving effect to all provisions of the Sale Agreement including the obligation of the Seller to pay market rent in case of delay in delivery of possession. He submitted that in response to the Buyers letter dated 31.03.2012 the Seller simply cancelled the allotment even though over seventy five percent of the sale consideration had already been paid. While doing so, the Seller disregarded clause-19 of the Sale Agreement, which provided for arbitration, which clause had been referred to by the Buyers in their letter dated 21.03.2012. He submitted that the dispute between the parties at such time was that of counter claims for receipt of moneys by the Buyers and the Seller, which they deemed were due to them under the Sale Agreement. Instead of seeking to adjudicate such claims, the Seller unilaterally cancelled the Sale Agreement and sold the Property to a third party at a much higher rate as the market price of the real estate has gone up over the six years that constituted the period of delay in delivery of possession. He submitted that the Seller led no evidence to support his claim that construction was delayed due to the earthquake of 2005 or that the said earthquake required structural changes to be made to the Property or its building plan or layout plan, which caused delay in construction. The Seller also led no evidence as to why the delivery of possession was delayed by five years and five months or to whom the Property was ultimately sold and on what price.

He submitted that the receipt of over seventy five percent of the sale consideration, the delay in delivery of possession of the Property by five years and five months, the unilateral termination of the Sale Agreement, and the sale of the Property to a third party at a much higher price while withholding the sale consideration paid by the Buyers reflected *malafide* on part of the Seller. He submitted that the Buyers' case for specific performance of the Sale Agreement was made out and the Buyers' suit should therefore have been allowed. But seeking such a relief would result in further delay in the return of the amounts due to the Buyers and the diminution in the value of money retained by the Seller and/or in the case of retrial as third party right had been created, which is why the Buyers had elected not to seek the setting-aside of the judgments and decrees, and were merely pressing for award of the decretal amounts granted to them.

10. Before we address the specific issues framed in the suits and the findings of the Civil Court, it is essential to address the underlining principles, which govern the rights of buyers and sellers in sale agreements, especially those where sale consideration is to be paid in the form of installments.

11. Contracts often involve reciprocal promises that reflect and determine the rights and obligations of contracting parties. It is understood that contractual parties are entitled to quid pro quo. The concept of contracts as bargains is encapsulated by the principle of "reciprocity" or "mutuality" within common law jurisdictions. This element of exchange requires a party to

deliver performance in return for performance by the counter-party. The starting point in any claim for breach of contract is to understand the nature of the bargain the parties entered into and the sequence of performance they agreed upon. Contract law doesn't consider reciprocity to be absolute equivalence in exchange, as it is for the parties to determine "value" in any exchange. But enforcement of contract law entails, more often than not, enforcement of counter-performance.

12. In breach of contract claims involving reciprocal promises the order of performance becomes relevant to determine which party is guilty of breach. In commercial contracts the sequence of performance will usually be provided explicitly. If not, common sense becomes the most potent tool of interpretation that helps determine the intent of parties with regard to the sequence of performance and risk allocation. Where simultaneous exchange is possible or feasible, the discharge of obligations more often than not is due simultaneously. In case of discharge of services, work-first-payment-later is often the scheme. But there may be agreement for advance payment or provision of security for payment or payment through installments linked to the stages of performance of work.

13. According to Patterson ('Constructive Conditions in Contracts' [1942] 42 CoL LR 903 at 917-920) the policy of the law has been to minimize risks, especially credit risk, that parties assume under a contract:

> *"The order of the time of performance of several promises has long been regarded as determining which promises are dependent and which are independent, and is the subject of many of the rules relating to dependency. Obviously if A performs promptly his promise to convey land to B on July 1st, and B has promised to pay the price on August 1st, A will credit B for one month. Then if A does not convey on July 1st, B's action commenced on July 2nd may be maintained without B's having tendered the price before suing. Yet even this mechanical test of dependency is controlled and supplemented, it is submitted, by a principal of policy which favors the construction of concurrent conditions and thus minimizes the credit burden of the transaction…*
>
> *"The construction of conditions of exchange not only protects a contracting party against impairment of his expectations and enhancement of his credit burden, but also gives him a method of coercing performance… The constructive condition thus supplements the limited remedies for specific performance by a form of legalized self-help. The promisor's privilege of refusing performance until a condition is fulfilled is a continuation of the coercive power which he had before he contracted, the power which any man has to refuse to relinquish his property or to perform his services unless paid or promised such return as he chooses to exact. This coercive power is preserved after the making of the contract in so far as is compatible with the terms of the bargain."*

14. One of the question that arises in case of breach of contract where obligations have been part performed is whether the obligations are severable. In the context of building contracts, lump-sum contracts are often construed as not being severable. In such cases, to avoid the harshness of one party not receiving any benefit at all the principle of quantum meruit has been employed by courts. In ***Sumpter v. Hedges*** ***([1898] IQB 673)*** the UK Court of Appeal noted that, *"there are cases in which, though the plaintiff has abandoned the performance of a*

contract, it is possible for him to raise the inference of a new contract to pay for the work done on a quantum meruit from the defendants' having taken the benefit of that work, but, in order that that may be done, the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done."

15. In order to inject fairness into contractual relations the doctrine of substantial compliance is employed by courts to ensure that the outcome in face of breach of contract is equitable. In ***Hoenig v. Isaacs* ([1952] 2 ALL ER 176)**, the plaintiff had been employed to decorate an apartment and the defendant refused to pay the balance amount due on the basis that some work was defective. The claim was allowed. Denning LJ noted in his opinion for the Court of Appeal that, *"it is not every breach of that term (of the contract) which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done."* Denning LJ observed that, *"the position, I think, in some aspects is analogous to a case where a man agrees to sell land and, before completion finds that he is unable to make title to a small part of it which is of no great significance in relation to the whole. In such a case the vendor can substantially perform what he has agreed to do but cannot perform it wholly, and the Court of Chancery has never hesitated to grant specific performance at this instance against the purchaser subject to a proper and reasonable deduction being made in the purchase price."*

16. The doctrine of substantial performance was explained by Corbin in 'Conditions in the law of Contract (1919) 28 Yale LJ 739, 759 (as reproduced in Contract Cases and Materials; HG Beale, WD Bishop & MP Furmston, Butterworths (3rd Edition) 1995, PP 493):

> *"It is correct to say that substantial performance of a condition is sufficient; but it is frequently correct to say that absolutely exact and complete performance by the plaintiff as promised is not a condition precedent to the duty of the defendant. If substantial performance by the plaintiff was sufficient to charge the defendant, then such substantial performance was the only condition and the requirement has been exactly fulfilled. The question of the plaintiff's duty to pay damages for his own partial non-performance is a different question altogether substantial performance of A's promise may be sufficient to enable him to maintain action against B, and yet at the same time be insufficient to prevent B from having an action against A."*

17. In ***Hong Kong Fir Shipping Limited vs. Kawasaki Kisen Kaisha Limited*** ***([1962] 1 ALL ER 472)***, the charterers had sought to charter a vessel for a 24-month period, which period was reduced to 17-months due to repairs. Meanwhile freight rates fell and the charterers purported to terminate the contract. The High Court held that the charterers did not have the right to do so and the Court of Appeal agreed. Upton LJ noted that, *"the question to be answered is, does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible, or, in other words, is the whole contract frustrated? If yea, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only."* Diplock LJ's

observations were equally cogent: *"does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as consideration for performing those undertakings? This test is applicable whether or not the event occurs as a result of the default of one of the parties to the contract, but the consequences of the event are different in the two cases. Where the event occurs as a result of the default of one party, the party in default cannot rely on it as relieving himself of the performance of any further undertaking on his part and the innocent party, although entitled to, need not treat the event as relieving him of the performance of his own undertakings. This is only a specific application of the fundamental legal and moral rule that a man should not be allowed to take advantage of his own wrong…"*

18. Distinctions regarding application of principles regulating contracts are made depending on the nature of contracts and whether they involve goods or services or immovable property. Yet when it comes to injecting reasonability and fairness within contractual relations, equity demands that the broad entrenched principles apply to the law of contract as a whole instead of selectively applying such principles to different branches of law dealing with contractual relations. Where there occurs a breach of a foundational condition stipulated in the contract, it is for the innocent party to treat the breach as repudiation and rescind the contract and elect to sue for damages. Or such innocent party may, at its option, prefer to

affirm the contract and treat it as continuing, while reserving its rights to sue for damages for the breach of the offending party or waiving its right to damages by accepting altered performance.

19. Where contracts have time stipulations, a performing party may withhold part performance to force the counter-party to perform in case of reciprocal promises, but cannot repudiate or terminate the contract until the time prescribed for performance has elapsed (with some exceptions, of course, such as anticipatory breach in case of frustration of purpose of impossibility of performance).Withholding performance or refusing to perform some part of an obligation till the counter-party performs or is willing to perform his/her obligations is seen as a self-help remedy to seek enforcement of obligations by the counter-party. Under a sale of goods contract for example, the buyer can refuse to pay at the agreed time for delivery if the seller is unable to deliver the contracted goods. The agreement to pay would be seen as a reciprocal obligation (and not an independent obligation) contingent upon supply or delivery of goods. It is in such cases that the question of whether or not time is of the essence for performance becomes relevant.

20. In construction contracts courts do not ordinarily construe time for performance to be of the essence, unless of course the contract itself explicitly states otherwise. The follow-up question is how long does an innocent party have to wait for performance or termination? In ***Universal Cargo Carriers Corporation Vs. Citati*** ***([1957]2 QB 401)*** it was held that the

innocent party had the right to terminate if the delay went to the root of the contract. In ***Hong Kong Fir Shipping Co*** referred to above, a similar test was employed. In contracts for sale of land where time is deemed not to be of the essence, if a party does not perform within the time envisaged, the innocent party can serve notice for performance and terminate thereafter upon failure of the counter-party to perform within a reasonable time. The law with regard to time being of the essence has been summarized in Halsbury's Laws of England (4th Edition, Vol 9, para 481) as follows:

> *"Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence."*

21. What is the effect of time being of the essence for performance? It entitles the innocent party to terminate the contract if not performed within the stipulated time, reserving for such party the right to recover for breach of contract and denying the defaulting party the right to seek specific performance of the contract or curing defective performance beyond the stipulated time. This is where the concept of withholding performance also becomes relevant. According to Beale, Bishop & Furmston (Contract Cases & Materials; Butterworths; 3rd Edition; PP 510), *"A does not have to perform her part of the contract if B has not performed a condition*

precedent, or if B is not ready and willing to perform a concurrent condition."

22. Since the 15th century, Roman law has recognized the right of a party to refuse to counter-perform in face of the counter-party's non-performance in a reciprocal contract as *exceptio non adimpleti contractus* (exemption of non-performance of contract). The scope of the exemption as explained by the South African Appellate Division in ***BK Tooling (Edms) BPK vs. Scope Precision Engineering (Edms)(BPK (1979 1 SA 391 (A))*** has been summarized by Andrew Hutchison in his paper "Reciprocity in Contract Law" (STELL LR 2013 1) as follows:

> *(i) In contracts where an exchange of performances is envisaged, it is a question of interpretation as to whether those obligations are sufficiently connected for the reciprocity principle to apply.*
>
> *(ii) The sequence of performances also depends on an interpretation of the contractual stipulations.*
>
> *(iii) The right to retain performance under the exceptio non adimpleti contractus is a means to enforce performance, providing security to the party raising the defence. In this way it is like a pledge.*
>
> *(iv) If the analogy of a pledge is correct, one can withhold one's performance until counter-performance has been received in full.*
>
> *(v) The burden of proof falls on the plaintiff (against whom the exceptio has been raised) to demonstrate that he has indeed performed his side of the contract.*

23. The recognition of the right to retain performance pending counter-performance is guided by the need to prevent unfairness being meted out to a counter-party. In ***Thomas***

Construction (Pty) Ltd (in Liquidation) vs. Grafton Furniture Manufacturers (Pty) Ltd ***(1988 2 SA 546 (A))*** the question before the South African Court was whether the obligation to pay an installment of the contract price payment had accrued before the contract was cancelled due to contractor's liquidation and before completion of the building. In that case, before the cancellation of the building contract, construction had reached a stage where an instalment of the contract price was due. Subsequently, due to Thomas Construction's liquidation the contract was cancelled and the building had to be completed by a third party. It was held that right to payment would be enforceable if prior to acceptance of the repudiation the same stood *"accrued, due and enforceable as a cause of action independent of any executory part of the contract."* **Hutchison** ***(STELL LR 2013 1 e 23)*** argued that under the test laid down in ***Thomas Construction***, *"the requirement of independent enforceability of the litigated right to payment ensures an examination of which obligations are reciprocal… in other words, which performances were agreed as being reciprocal in the initial contract and what was the nature of the bargain struck between the parties. This quid pro quo inquiry will prevent an unreciprocated payment under a contract, thereby discouraging breach by contractors and ensuring the mitigation of future damages claims, since the contractor in breach will not be able to claim for outstanding amounts where it has not properly fulfilled its obligations under a building contract as a whole."*

24. As has already been touched upon, under common law withholding of performance under a contract in face of non-performance by the counter-party is recognized as a self-help remedy. It has been argued by Mc Bryde (The law of Contract in Scotland, para 20-67) that, *"the principle of mutuality of obligations applies to all contracts, and so in any type of contract a claim for the sums due under the contract may be met by the defence that the defender has claims arising from the pursuer's failure to perform that contract."* In ***Laurie vs. British Steel Corporation (1988 SLT 17)*** it was observed that a fundamental rule of Contract law was, *"that if one party does not fulfill his part of the mutual contract he cannot turn round and demand performance by the other party of his part of the contract."* The equitable nature of the remedy of retaining performance and the discretionary control asserted by the Court in allowing or refusing retention in mutual contracts was recognized in ***Stobbs & Sons vs. Hislop (1948 SC 2016)*** wherein it was held that, *"retention of rents does not rest on any principle peculiar to the law of leases, but is simply one of the many instances of the general equitable rule of scots law that reciprocal obligations arising under a mutual contract are the counter parts of each other, and that, under suitable circumstances, a party to such a contract will be permitted to withhold performance of his obligations unless and until the other party has performed his or to put it from the opposite angel, that failure to perform a material part of the contract on the part of one party will prevent him from suing the other for performance."*

25. *"The order in which contracting parties must perform their respective obligations depends on the distinction between conditions, precedent, concurrent conditions and independent promises,"* notes GH Treital (***The law of Contract***; Sweat &Maxwel9thEdition, PP 677). A condition precedent, as we understand, is a requirement for one party to perform before the liability of the counter-party accrues. For purposes of clarity, in the context of sequence of performance under a contract, we are referring to condition precedent as a condition to the accrual of liability for the counter-party and not a condition to the conclusion of a contract). Concurrent conditions are those conditions which are to be performed by the parties to a contract simultaneously, like payment and delivery under a sale of goods contract, or payment and transfer of possession or title in a real estate transaction. Independent promises are those obligations which are to be discharged and the performance of which cannot be withheld due to non-performance by the counter-party of some obligation under the contract. In case of concurrent conditions, the failure of one party to perform justifies withholding of performance by the innocent party (but may not entitle rescission of contract if time is not of the essence).

26. Picking up the discussion re time being of the essence where it was left off in paras 20 and 21 above, the principle that evolved in equity was that in contracts for sale of land time was deemed not to be of essence. The exception obviously was to allow agency to contracting parties and uphold their bargain where they expressly provided in their contract for sale of land that time was of the essence for performance. Other exceptions

to the rule have also emerged over time i.e. where the subject-matter of the contract is of a speculative nature and/or subject to rapid depreciation or appreciation; or building contracts or sale of property contracts of a commercial nature etc. Relying on the law laid down in ***United Scientific Holdings Limited vs. Burnley B.C.*** ***([1978] AC 904, 924)***,Tritel has argued (The law of Contracts; PP 742), *"the notion that some contracts for the sale of land are, while others are not, "commercial" is questionable now that land is an article of commerce, subject to violent fluctuations in value."*

27. The concept of (i) reciprocity and quid pro quo as a basis for contractual relations, and (ii) the disentitlement of a party to seek performance of obligations by the counter-party when the first party has itself not upheld its end of the bargain, is also rooted in sections 39, 51, 52, 54 and 55 of the Contract Act, 1872 ***("Contract Act")***, sections 4,11,31 and 32 of the Sale of Goods Act, 1930 ***("Sale of Goods Act")***, sections 54 and 55 of the Transfer of Property Act, 1882 ***("Transfer of Property Act")***, and sections 19,22 and 24 of the Specific Relief Act, 1877 ***("Specific Relief Act")***.

28. In ***Syed Muhammad Saleem vs. Ashfaq Ahmed Khan and another*** ***(1989 CLC 1883)*** the view taken in ***Soori Chetty Ranga Nathan vs. G. ParthaSarathy Chetty*** ***(AIR 1921 Mad. 141)*** was cited with approval that, *"in contracts for the sale of land time is not, ordinarily, considered to be of the essence of contract within the meaning of Section 55 of the Contract Act, if there is nothing in the express stipulations*

between the parties, the nature of the property, from the surrounding circumstances which would make it inequitable to apply the rule. It was further held that even where time is not of essence yet postponement of performance to an unreasonable extent by the vendee will entitle the vender to terminate the contract."

29. While relying on ***Syed Muhammad Saleem*** a Division Bench of the Lahore High Court emphasized in ***Bank Alfalah Limited, Lahore vs. Punjab Small Industries Corporation through Managing Director (2023 CLD 14)*** that, *"under section 54 of the Contract Act, when a contract consists of reciprocal promises, such that one of them cannot be performed and the promisor of the last mentioned fails to perform it, such promisor, not only cannot claim specific performance but must pay compensation for the resulting loss."* It has recently been held by the Supreme Court in ***Mst. Rehmat and others vs. Mst. Zubaida Begum and others (2021 SCMR 1534)*** in the context of the Transfer of Property Act read together with Section 54 of the Contract Act that where an agreement contains reciprocal promises and the vendor fails to perform her part of reciprocal promises, she could not be allowed to rescind or revoke the agreement.

30. The approach to considering time as being of the essence has not been inflexible when it comes to contracts dealing with immovable property. In ***Zaheer Ahmad vs. Abdul Aziz (1983 SCMR 559)*** it was held that the party responsible for prevention of completion of a contract could not plead that

time was of the essence. Supreme Court reiterated the principle in ***Mrs. Mussarat Shaukat Ali vs. Mrs. Safia Khatoon and others (1994 SCMR 2189)*** by holding that:

> *"It is open to the parties while entering in the agreement of sale in respect of an immovable property to provide that the time for performance of the agreement will be treated as essence of the contract. In such cases, if the party seeking enforcement of the contract is shown to be in breach of the contract, the Court may in appropriate cases refuse to enforce the contract. It is, however, well-settled law that in the absence of a provision in the agreement to sell an immovable property that the time fixed for performance of the contract is to be treated as the essence of the contract, the time fixed for performance of the contract is not treated as the essence of the contract. Therefore, specific performance of an agreement of sale relating to immovable property can be granted by Courts even after expiry of the period fixed in the contract."*

31. As a general matter, the approach to considering time to be of the essence as stated in ***Mussarat Shaukat Ali*** remains good law. In ***Amina Bibi vs. Mudassar Aziz (PLD 2003 SC 430)*** it was clarified that while seeking specific performance of a contract, the party seeking enforcement had to establish that it was always ready and willing to perform its part of the contract. In other words, a party that is in breach of its own obligations under a contract can neither seek specific performance of the contract nor rescind the contract claiming that time was of the essence for performance.

32. More recently the approach of the Supreme Court in disputes regarding performance of contracts appears to be that the court must focus on balancing equities and whether or not time is of the essence in immovable property contracts might not

be the most pivotal question. It was held in ***Muhammad Abdur Rehman Qureshi vs. Sagheer Ahmed*** ***(2017 SCMR 1696)*** that:

> *"[i]n view of the commercial nature of the property business and a widespread trend of rapid increase in prices of immovable properties, a seller cannot be left at the mercy of the buyer to bind him in an agreement to sell and then delay completion of the contract for as long as he may wish hiding behind an archaic legal principle that in contracts involving immovable properties, time is generally not of the essence. This rule was settled many centuries ago when prices of real estate remained constant and stagnant for years on end. It is high time that this rule was revisited and revised keeping in view the changed circumstances and the ground realties of the real estate market…On account of increasing demand and limited supply, property prices rise rapidly, at times in a matter of months. Therefore, the aforesaid principle that in real estate transactions, time is not of the essence cannot indiscriminately be applied. It must be interpreted and applied specifically considering the facts and circumstances of each case to balance equities, keeping the standards of reasonability in mind and ensuring that injustice is not done to either side."*

33. Similarly, in ***Shaukat Ullah Khan Bangash vs. Adil Tiwana and others*** ***(2018 SCMR 769)***, Supreme Court, while considering a claim for specific performance held that:

> *"If grains of equity could be poured in one scale of justice while declining specific performance of contract to the petitioner, they could also be poured in other scale of justice to compensate the petitioner whose huge sum remained with the respondent for almost two decades and five times more of it remained deposited in the High Court for more than a year pursuant to the judgment of the High Court. It would thus be unjust to leave the petitioner high and dry while declining specific performance of contract. Petitioner, in no case, be denied the bare minimum which he would have*

been given in the form of interest, had he deposited this much sum in the bank."

34. This approach to equity-driven restitution of the non-defaulting party is reflected in cases where compensation has been awarded instead of ordering specific performance or even as a measure of fairness while ordering the return of an advance or part payment. In ***Inayat Ullah Khan and others vs. Shabir Ahmad Khan*** ***(2021 SCMR 686)*** the Supreme Court while rejecting a claim for specific performance held that:

"[i]nvariably the value of money depreciates over time and that of land appreciates. Courts adjudicating such cases should not be unmindful of this reality and should endeavor to secure the interest of both parties. In a suit for specific performance of land, if the seller/vendor has refused to receive the sale consideration, or any part thereof, it should be deposited in court and invested in some government protected security (such as Defence or National Savings Certificates); in case the suit is decreed the seller would receive the value of money which prevailed at the time of the contract and in case the buyer loses he can similarly retrieve the deposited amount.

35. In ***Saeed Ullah Khan vs. Muhammad Khalid*** ***(2018 CLC 648)*** this Court while ordering the return of earnest money in the amount of Rs.100,000/- held that the recipient of the funds would return an amount of Rs.1 million as he had benefited from retaining such amount for a period of 13 years. In ***Malik Bahadur Sher Khan vs. Haji Shah Alam*** ***(2017 SCMR 902)***, Supreme Court while refusing a claim for specific performance held that the appellant who had retained a deposit of Rs.2 million while making no effort to return it, would return to the respondent an amount of Rs.3 million over and above the

deposit of Rs.2 million keeping in view *"decrease in the value of Rupee and corresponding increase in the price of the land."*

36. The guiding principle for grant of compensation (as an alternative to specific performance or for breach of a contractual obligation or as refund of an amount retained upon rescission of contract to prevent unjust enrichment) is restitution, as evident from the case law cited above. While determining the quantum of amount to be returned, courts have borne in mind the time value of money in the circumstances of each case. In various instances the value of gold or the inflation-adjusted amount or currency-depreciated value have been used as a measure or index to calculate the value of money lost overtime for compensatory purposes. In a dispute involving immovable property, the actual value of property at the relevant time and the proportion of compensation received as a percentage of total value could be a reasonable measure of the compensation payable by a party found liable for return of funds.

37. The determination of the quantum of compensation payable is however an inquiry separate from that of the liability to pay any compensation or issue a refund or return an advance etc. In many jurisdictions trials are bifurcated into two stages, where the question of liability is adjudicated on a stand-alone basis at stage one and the question of quantum of damages or compensation is left to stage two, to enable the parties to lead evidence for such purpose if liability is established at stage one. Such scheme makes sense where time and resources of the parties and the court consumed in recording evidence for

purposes of quantification of a claim can be avoided altogether if no liability is established in the first place at stage one of the trial.

38. In our jurisdiction, we do not find much debate surrounding quantification of damages or the measure to be used for such purpose largely because the stages of determination of liability and quantification of such liability are collapsed into one. This need not be so. Section 2(2) of the Code of Civil Procedure, 1908 ***("Code")*** defines "decree" to mean *"the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final."* The Code in various orders provides for passing of a preliminary decree in certain suits. But the Sindh High Court has rightly observed in ***Syed Tariq Mustafa vs. Tauqir Jahan Mustafa (PLD 2022 Sindh 423)*** that, *"a Court may pass a preliminary decree in cases not expressly provided for in the Code."* It cites with approval the judgment of Indian Supreme Court in ***Shankar Balwant Lokhande vs. Chandrakant Shankar Lokhande (AIR 1995 SC 1212)*** wherein it was held that, *"a preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is final."*

39. In a claim for specific performance and/or breach of contract, ordinarily, a just, expeditious and least expensive case management strategy would be for the Court to determine the question of liability at stage one in the trial. Where no liability is found on part of the respondent, the matter would rest and a final judgment and decree can be rendered. However, where liability is established, such declaration of rights and liabilities can take the form of a preliminary decree, and the trial can proceed to stage two where the parties lead their respective evidence for purposes of quantification of the liability, a determination in relation to which by the Court can conclusively determine the respective rights and liabilities of the parties.

40. Therefore, if the claim is only for specific performance, the Court can determine the rights to specific performance in a single-stage trial and a final judgment can be passed without the need for further proceedings. If the claim is for both specific performance and damages for breach of contract the Court can determine the claim for specific performance at stage one and declare the entitlement to specific performance in the form of a preliminary decree and the quantification of damages in addition to specific performance can be adjudged at stage two. However, if the claim is only for damages the Court can determine the entitlement to damages at stage one of the trial and if it finds in favor of the party's entitlement to damages, it can proceed to stage two of the trial for quantification of the damages.

41. Before we summarize the principles of law discussed above that are relevant for adjudication of the present appeals,

let us briefly consider the nature of a real-estate purchase agreement with an installment plan. The sources of funding of greenfield or brownfield real-estate projects include equity investment by the developer, loan obtained for such purpose and advances received from purchasers. The installment plan provided to a purchaser forms part of the advance paid for purchase of the immovable property being developed by the developer for delivery to the purchaser. The mere fact that real-estate is being purchased in a manner wherein consideration is being paid in installments does not transform the purchase agreement into a construction finance agreement. Unless the parties explicitly agree otherwise in their written agreement, an agreement for sale of immovable property, even where payment of consideration is installment based, will entail the rights and liabilities of buyers and sellers as provided in Section 55 of the Transfer of Property Act.

42. As has been explained in some detail, the starting point in any sale agreement, whether regulated by the Sale of Goods Act or the Transfer of Property Act, is that it involves an exchange: the seller is handing over possession and ownership of property in lieu of consideration to be paid by the buyer. The scheme of delivery of possession, transfer of ownership and payment of consideration, whether lump-sum or in installments, doesn’t change the fundamental character of the bargain, which is of a reciprocal nature. The sequence of performance of the respective obligation will of course depend on the terms of the agreement and contracting parties are free agents who can agree to whatever scheme suits their needs and interests. The

only point to note here as a general matter is that neither the obligation of the seller to transfer the possession and ownership of property nor the obligation of the buyer to pay consideration are independent obligations.

43. In the context of reciprocal promises and a contract for mutual exchange, it is for the Court to determine the sequence of performance agreed upon. Where an installment plan is agreed upon to reflect the pace of construction and ultimate delivery of real-estate property upon completion, unless the agreement reflects a contrary view, the obligation of one party to pay consideration and that of the other to deliver possession and ownership are concurrent conditions in view of Section 55(1)(f) read together with Section 55(5)(b) and Section 55(6)(b) of the Transfer of Property Act. Section 55(5)(b) of the Transfer of Property Act envisages retention of consideration as a self-held measure to set-off the amount due re any encumbrance. Section 55(6)(b) of the Transfer of Property Act likewise provides that any payment made by the buyer in lieu of consideration for immovable property, creates a charge in favor of the buyer against the seller's interest in the property, subject of course to conditions prescribed therein, including, *inter alia*, that the buyer must not have improperly refused delivery.

44. The application of Section 55(6)(b) of the Transfer of Property Act came before the Madras High Court in ***Income Tax Officer vs. K.A. Govindaswarmy (1978 113 ITR 593 Mad)***, which observed that, *"this statutory privilege resulting in a charge in favor of the intending buyer is based on the*

well-known principle of justice, equity and conscience. This is because once the buyer has paid the whole or part of the price of the property in question, the vendor becomes a trustee for him and to the extent to which the buyer has paid the purchase money, the buyer acquires a lien over the property." In the matter of ***Nagammal vs. Ayyavie Thever*** ***(AIR 1973 Mad. 353)***, Madras High Court explained that the principle embedded in Section 55(6)(b) of the Transfer of Property Act was based on equitable principles rooted in English law. It cited Vice Chancellor Kinderslay's observations in ***Wythes vs. Lee((1855) 61 ER 954)*** who said:

> *"suppose a person, absolute beneficial owner in fee of an estate, contracts to sell it, and the purchaser pays the deposit in part payment of the purchase-money, and by reason of the vendor being unable to made a title or for any other reason, not being misconduct on either side, the contract goes off and cannot be completed, has the purchaser a lien on the estate for his deposit?.... it does appear to me that it is consistent with natural justice, that if a purchaser, on the faith of the contract being completed, and the estate becoming his, has advanced moneys in payment or part payment for the purchase, he has advanced it under circumstances which entitle him to say 'if you cannot compete, not only are you bound to give me back my money, but I have a right to a lien on the estate'."*

45. This Court agrees with the dicta in ***Wythes vs. Lee*** and ***Nagammal vs. AyyavuThever*** re the scope and effect of Section 55(6)(b) of the Transfer of Property Act. Section 55 of the Transfer of Property Act envisages an agreement for sale of property as one based on the principle of reciprocity. Sub-

Section (1)(f) and (3) of Section 55 require the seller to transfer possession and ownership of property upon receipt of consideration and/or completion of sale, unless provided otherwise by the terms of the Agreement. Section 55(5)(b) creates a corresponding obligation for the buyer to pay compensation to complete the sale. Section 55(4)(b) conceives of a situation where possession and ownership have been transferred to the buyer without complete payment of consideration in which case the seller is entitled to a charge over the property proportionate to the outstanding purchase money. And likewise, where the buyer hasn't *"improperly declined to accept delivery of the property"*, he is entitled to a charge over the property proportionate to the consideration paid "*in anticipation of delivery.*" This scheme and the equitable principle underlying it applies squarely to payment of consideration for purchase of property through an installment plan.

46. Section 51 of the Contract Act excuses performance by one party when the counter-party is unwilling to perform a reciprocal promise. According to Section 52 of the Contract Act, the contract is to provide for the order of performance of reciprocal promises. But where such order is not clearly stipulated, it provides that promises *"shall be performed in that order which the nature of the transaction requires"*. In case of sale of development property yet to be constructed, the installment plan is ordinarily designed to mirror the stages of development with final payment matching the time of delivery of the property thus completing the sale transaction. But for example in case of purchase of an apartment unit in a 10-floor

building, the buyer withholds some of the final installment payments because the builder is yet to initiate construction or because the delivery of the unit at the prescribed time for delivery is an impossibility, unless the contract provides otherwise, the buyer would conceivably be within his right to withhold payment as a self-help measure to force performance of counter-promises by the seller under Sections 51 and 52 of the Contract Act. And where the buyer is not in default of his obligations and the seller is in default of his obligation to deliver the property, the buyer cannot be denied a charge on the property proportionate to the sale consideration paid in view of Section 55(6)(b) of the Transfer of Property Act, merely because he chooses to exercise his right to force performance of counter-promises made by the seller under Section 51 of the Contract Act.

47. During the course of arguments, the attention of this Court was drawn to the law laid down in ***Pak Gulf Construction Private Limited Vs Abdul Hamid Baig (2019 M L D 1178)***which was reiterated in ***Federal Government Employees Housing Foundation Vs Javaid Igbal (2020 Y L R 2306)***.It was held therein that the obligation to make installment payments to the builder according to the agreed schedule was a prior obligation to the delivery of possession. It is clarified that contracting parties have agency and are at liberty to agree to any terms in a contract. In ***Pak Gulf Construction,*** while setting aside the award by an arbitrator this Court found that the terms of the contract prohibited the buyer from stopping installment payments and entitled the builder to terminate the

contract in case of suspension of installment payment after serving notices, which mechanism was used by the builder to terminate the contract resulting in a dispute. It was noted that, *"clause 16-2 of the agreements provides that the purchaser shall not stop paying installments of the sale price under any circumstances."*The ratio of the case was that where a buyer unilaterally suspends his obligation to make installment payments, he cannot seek counter-performance from the seller in seeking delivery of possession and ownership. The fact pattern that we are considering is the reverse of that which existed in ***Pak Gulf Construction.*** The intent of the contracting parties is to be deciphered from the express provisions of the contract. But a contract for sale of property where the obligation of the buyer to pay consideration would be treated as an obligation independent of the obligation of the seller to deliver possession and ownership within the stipulated time, would be treated as an exception and not the rule. The rule would remain that a contract for sale of property is a contract involving reciprocal promises by the buyer and the seller as envisaged by Sections 54 and 55 of the Transfer of Property Act. Where a seller is unwilling or unable to deliver possession and ownership of property in accordance with the time stipulated in the contract, he cannot force the buyer to pay the entire sale consideration or cancel the contract for the buyer's refusal to do so. Neither law nor equity will allow a seller to benefit from his own wrong in delaying delivery of possession and ownership of property while forcing the buyer to part with the entire sale consideration and

indefinitely garner the benefit of such advance or free credit at the expense of the buyer.

48. Even as a matter of public policy, law will not acquiesce with or condone delay in delivery of property in breach of provisions of the contract stipulating the time for delivery. The only real consequence of whether or not time is of the essence for performance of an obligation is in terms of determining whether the non-defaulting party is entitled to terminate the contract failing receipt of performance within the stipulated time. Even where time is not explicitly made of essence in a contract as per its terms, but a timeline for performance is stipulated, performance can be demanded by notice, failing which the non-defaulting party would be deemed entitled to terminate. As highlighted in ***Muhammad Abdur Rehman Qureshi Vs Sagheer Ahmad*** ***(*****2017 SCMR 1696*****)***, the erstwhile understanding that time is not of the essence in a contract for sale of immovable property is no longer carved in stone. But this jurisprudential evolution is accompanied by the principle that in a dispute for specific performance of an agreement or breach of contract, it is the obligation of the Court to balance equities. Consequently, where a buyer has paid an advance comprising a small portion of the sale consideration, he will not be allowed to tie up the property indefinitely if he is not ready and willing to pay the balance within the stipulated time period. Likewise, where a seller has received a substantial portion of the sale consideration but is not ready and willing to deliver possession and ownership, he will also not be allowed to force the buyer to pay the remaining consideration or else suffer cancellation of the

sale contract. And it is in considering the performance of mutual obligations and/or breach, with a view to balancing equities, that the doctrine of substantial performance will come into play. Where one party has substantially performed his/her part of the bargain, a court will loath to interpret the contract such that the other party is able to terminate the contract despite the others' substantial performance and reap a windfall.

49. Let us now summarize the relevant principles for adjudication and management of claims for breach of contract re immovable property.

(i) A contract for sale of immovable property is a contract involving reciprocal performance by the seller and the buyer, unless its terms explicitly state otherwise;

(ii) The order of performance of the reciprocal promises can be provided in the contract, failing which the nature of transaction would require that obligation of a buyer to pay consideration be discharged simultaneously with the obligation of the seller to deliver the property;

(iii) In view of Section 51 of the Contract Act, either party may withhold performance of an obligation, where the counter-party is unable or unwilling to perform counter-promise, and in such event the defaulting party would have no right to terminate the contract and the principle of exceptio non adimpleti contractus would apply;

(iv) Time not to be considered of essence in transactions of immovable property is not a rule carved in stone, and it is the obligation of the court in a breach of contract claim to balance equities between contracting parties, which is why no party can be

allowed to tie up the money or the property of a counter-party indefinitely or seek the benefit of its own failure to perform a promise or obligation within the stipulated time;

(v) Where a buyer has paid consideration or part consideration and has not refused improperly to accept delivery and the seller is delinquent in delivering the property in accordance with the time-line stipulated in the contract, the buyer acquires a charge over the property to the extent of consideration paid under Section 55(6)(b) of the Transfer of Property Act, and the seller can't defeat such interest by seeking to rescind or terminate the contract;

(vi) In case of breach of performance of obligations by both the buyer and the seller within the stipulated period, where the failure of performance by one party has not caused the failure of performance by the other, it is for the Court to balance equities between the parties and ensure that none of the parties gets a windfall or is able to benefit from his own wrong; and

(vii) In a claim for breach of contract and/or specific performance, the question of liability is to be separated from the question of quantification of damages, with the question of liability to be determined at stage one in the trial; where there is no claim for damages in addition to or as an alternative to specific performance, there need not be a stage two in the trial or need to issue a preliminary decree, however, where damages are claimed in addition to or as an alternative to specific performance, where liability of a party for breach is established at stage one, its quantification must be undertaken at stage two to determine the amount

due to be paid by one party to the other in lieu of damages.

50. Let us now revert to the facts and the law relevant for purposes of the appeals being decided by this judgment. The Sale Agreement and its execution are not contested. At the time of execution of the Sale Agreement a sum of Rs.556,250/- was paid as earnest money by the Buyers and the schedule of balance payment to be made through twelve installments was agreed upon. Clause-1 of the Sale Agreement provided that the Seller was to deliver possession of the Property by 31.12.2006. The schedule of installments reflects that the 11thinstallment payment in the amount of Rs.139,062/- was to be paid on the date of delivery. And the final installment in like amount was to be paid on 31.03.2007 i.e. three months after the delivery of possession (Clause-1 of the Sale Agreement also contemplated a grace period of three months for delivery of possession). Clause-2 of the Sale Agreement then provided that the Buyers, who default on timely payment of installments, would be liable to pay a penalty at the rate of five percent of the installment due. It further provided that the Sale Agreement could be cancelled if an installment was not received within sixty days of the period when it became due, and the sale consideration received would then be returned by the Seller after deduction of ten percent of the total price of the Property, and that such refund would be paid after completion of the Project and the Property being sold to a third party.

51. Corresponding with the obligation of the Buyers to make installment payments it was the obligation of the Seller to deliver

possession. The penal consequences for failure to do so were provided in clause-18 of the Sale Agreement, which stated that if the Seller was unable to complete construction of the Property within the prescribed period, the Seller would be obliged to pay market rent to the Buyers for the period of delay. Clause-19 of the Sale Agreement then provided that in case of a dispute between the parties, they would try to resolve it amicably, failing which it would be referred to arbitration. The Buyers have adduced evidence establishing that they paid earnest money at the time of execution of the Sale Agreement and paid eight out of twelve installments in the case of Muhammad Sabir as buyer (the installments paid by the other buyers are reflected in tabulated chart produced under para 5). Consequently, Muhammad Sabir as buyer had paid eight installments and total sale consideration of Rs 1,668,746, which amounted to approximately seventy five percent of the total consideration payable. The last such installment payment was made on 16.08.2006. The Seller did not seek payment of remaining sale consideration of Rs.556,248/- up until 16.06.2009.

52. A legal notice issued by the Seller seeking payment of the balance (exhibited as D-I by the Seller)stated that the failure to make such payment would attract a penalty of twenty percent on the installment due per month. Such penalty amount did not co-relate to the five percent penalty prescribed in clause-2 of the Sale Agreement on 16.06.2009. Further when such notice was issued the Seller did not avail his right to declare that the Sale Agreement stood cancelled subject to deduction of ten percent of the total price of the Property under clause 2 of the Sale

Agreement. It also stated that the Seller was making best efforts to hand over possession of the Property to the Buyers in March 2010. In other words, pursuant to notice dated 16.06.2009 the Seller did not exercise his right to cancel the Sale Agreement upon delay in payment of the sale consideration and instead waived such right while also acknowledging that he was in default of his obligation to deliver the Property by 31.12.2006 and represented that he was making an effort to deliver the same by March 2010. What this also meant was that he was seeking payment of the entire sale consideration almost nine-months prior to the intended date of handing over possession of the Property in breach of provisions of the Sale Agreement.

53. With regard to change in the apartment number, another letter from 16.06.2009 issued to Muhammad Sabir as buyer stated that his apartment had been changed from number 508 to number 1102 on the recommendation of structural engineer hired by the Seller. The next correspondence of relevance is the Notice of Readiness dated 15.03.2012, through which the Seller demanded a payment of outstanding dues by 15.04.2012. The Notice of Readiness provided that *"your apartment number 1102 is nearing completion"*. This makes it evident that as of 15.03.2012 the Property was not completed for delivery and such delivery was made contingent upon payment of balance sale consideration by 15.04.2012. The Notice of Readiness also stated that in case of failure to clear the balance sale consideration by 15.04.2012, the Sale Agreement would stand cancelled. In other words, the Notice of Readiness (Mark D/2) clarifies that the Seller had elected not to exercise the right to

cancel the Sale Agreement up until 15.04.2012 and had also acknowledged that the delivery of possession of the Property, which was originally due as of 13.12.2006 had not been made thus far and would be made soon after 15.04.2012 upon payment of balance sale consideration. The Buyers responded by letter dated 21.03.2012 (Mark P/14), which asserted that delivery of possession was due as of 31.12.2006 and that while the Seller was demanding penalty for late payments on the outstanding installments, the Buyers were seeking the market rent in lieu of late delivery pursuant to clause-18 of the Sale Agreement. And after setting off the two demands, there was an outstanding amount of Rs.368,754/- due to the Buyers, which ought to be paid along with delivery of possession. It was after this correspondence from the Buyers that the Sale Agreement was cancelled by the Seller by letter dated 08.05.2012. Such cancellation letter also stated that a refund of the deposited amount would be paid upon application by the Buyers in accordance with the terms and conditions of the Sale Agreement.

54. In his testimony on behalf of the Buyers, PW-1 stated that the number of the apartment had been unilaterally changed by the Seller and no evidence was adduced to establish that the structure of the apartment complex was changed or that the building design or layout plan was changed on the instruction of the Capital Development Authority (CDA) as a regulator causing a delay in construction of the Property. DW-1 appeared as a witness for the Seller and admitted that no evidence had been adduced and no layout plans or building plans

had been exhibited reflecting that the building structure or layout plan had been changed under instruction from CDA as a consequence of the earthquake in 2005. He acknowledged that after the earthquake in 2005 the grey structure that already stood erected was never deconstructed or structurally altered. He acknowledged that the amount of sale consideration paid by the Buyers remained in the use of the Seller. He admitted that 15.04.2012 was mentioned as the date for handing over of the possession in the Notice of Readiness. He also admitted that the Buyers had contended that they were ready to pay the balance sale consideration subject to handing over of possession of the Property. He also admitted that the Seller was no longer willing to hand over possession of the Property subject to payment of balance sale consideration.

55. The facts that emerge from the pleadings and evidence adduced before the Civil Court reflect that the Sale Agreement comprised reciprocal promises by the Seller and the Buyers. The Buyers were to pay the 11thinstallment by 31.12.2006, which was the date fixed for handing over the possession of the Property to the Buyers. The last installment payment was to be made three months thereafter after which the transfer of ownership was to take place pursuant to clause-11 of the Sale Agreement. In case of delay in making an installment payment, the Seller was entitled to five percent penalty on the installment payment amount for a period of up to sixty days. After the expiry of sixty days, the Seller was entitled to terminate the Sale Agreement subject to deduction of ten percent of the total sale consideration. Conversely, in the event of delay in delivery of

possession, the Buyers were entitled to receive market rent from the Seller for the period of delay in delivery of possession. It was in this backdrop that the Buyers continued to pay installments up until the last quarter of 2006, by which time they had paid earnest money along with eight or nine out of twelve installments, which constituted approximately seventy five percent of the total sale consideration or more. Meanwhile, their apartment number was unilaterally changed and there was inordinate delay in completion of the Project: letter dated 16.06.2009 (Mark P/5) issued by the Seller admitted that efforts are being made to deliver possession in March 2010, and the Notice of Readiness dated 15.03.2012 (Mark P/2) advised the Buyers that delivery of possession would be made on 15.04.2012.

56. The Notice of Readiness therefore establishes that there was delay of five years and five months in the discharge by the Seller of his obligation to deliver possession originally scheduled for 31.12.2006 under clause-1 of the Sale Agreement. It was in these circumstances, where it became evident that discharge of the Seller's obligation to deliver possession by 31.12.2006 had become impossible, that the Buyers withheld payment of remaining installment payments to seek discharge of obligations by the Seller. It is also evident from notice dated 16.06.2009 (Mark P/1) and Notice of Readiness (Mark D/2) that the Seller had acquiesced in the delay in payment of installments with the admission that there had been a delay by the Seller in discharge of his obligation to deliver possession as promised in the Sale Agreement. Once it was acknowledged that the Seller had

defaulted on his obligation to deliver possession by 31.12.2006, he could not seek counter-performance of the obligation of the Buyers to pay the entire sale consideration in accordance with the original schedule or payment according to the Sale Agreement. Likewise, the Seller's entitlement to penalty for delay in payment of installments was balanced by the Buyers' entitlement to receive market rent in case of failure by the Seller to deliver possession. If the Seller had upheld his end of the bargain and was ready and willing to deliver possession of the Property by 31.12.2006, he would have been entitled to cancel the Sale Agreement pursuant to clause-2 of the Sale Agreement in case of failure by the Buyers to make installment payments beyond the 60-day grace period. He, as aforementioned, acknowledged by letter dated 15.03.2012 that he would only be able to deliver possession of the Property by 15.04.2012 subject to payment of balance sale consideration. This meant that he had waived the original right to cancel the Sale Agreement in the event that the installment payment had not been made within a period of sixty days from the period when it had become due. Even if he had not waived such right, he could not cancel the Sale Agreement in circumstances where he was in default of his own obligation to deliver possession of the Property within the period stipulated in clause-1 of the Sale Agreement. The obligation of the Buyers to pay sale consideration was a reciprocal promise in lieu of the receipt of possession and ownership of the Property and not an independent obligation. Therefore, where the Seller was in default of his obligation to construct the Property and get it ready for delivery, he could not

force the Buyers' obligation to pay balance sale consideration in isolation or cancel the Sale Agreement and derive a benefit from his own wrong in failing to deliver possession by the scheduled date of 31.12.2006.

57. The Seller led no evidence before the Civil Court to establish that the earthquake of 2005 was a force-majeure event that created circumstances beyond control of the Seller to deliver possession within the stipulated period. The Seller led no evidence to establish that the earthquake of 2005 resulted in any change of the building code prescribed by CDA or the approved layout plan or building plan for the Project. DW-1, who appeared as witness for the Seller, acknowledged that no such evidence was adduced and further that the grey structure that had already been erected by the time that the earthquake transpired was not fundamentally altered or re-constructed to give effect to any building code. Therefore, there was no basis for the Civil Court to conclude that the Seller was willing and able to discharge his obligation to deliver possession of the Property by 31.12.2006 when it was also acknowledged by him through his Notice of Readiness that the delivery of possession would not take place before 15.04.2012, or that the failure of the Seller to deliver possession by 31.12.2006 was on grounds of force-majeure for reasons beyond his control. Even in the event that an event of force-majeure resulted in delay in the discharge of the obligation by the Seller to deliver possession, the time for discharge by the Buyers of the counter obligation to pay complete consideration for the Property would need to be adjusted as well.

58. In the Sale Agreement it was provided that the final installment payment was payable three months after the delivery of possession and consequently unless the Buyers were ready and willing to deliver possession, he could not have sought payment of the entire sale consideration under the terms of the Sale Agreement. In the event of delay in any single installment payment, the Seller could have sought to terminate the Sale Agreement in the event that he was not in breach of his own obligations under the Sale Agreement. The Seller could therefore have put the Buyers on notice on 30.09.2006 or 31.12.2006 that he would exercise his right to terminate the Sale Agreement under clause-2 of the Sale Agreement in the event that the Buyers failed to make the relevant installment payment within sixty days. The Seller did not assert such right as he was in breach of his own obligation to deliver possession on 31.12.2006. What the Seller could not have done on 15.04.2012 when he was already in default of his obligation to deliver possession for a period of five years and five months and the buyers were in substantial compliance of their obligation to pay consideration was to declare that he would terminate the Sale Agreement unless the entire sale consideration was paid. This was in view of the installment payments schedule, whereby the last installment was to be paid three-months after the delivery of possession.

59. In response to the demand for payment of balance sale consideration, the Buyers did not refuse to make such payment. Instead they claimed a set-off against the market rent payable by the Seller since the stipulated period of delivery (i.e.

31.12.2006).At such point, the Buyers had already paid approximately seventy five percent of the sale consideration and had acquired a charge against the Property to such extent in view of Section 55(6)(b) of the Transfer of Property Act. Further they did not deny their obligations or willingness to pay balance sale consideration. They asserted that the balance consideration payable by the Buyers beset off against the rent payable by the Seller. This gave birth to a contractual dispute that ought to have been adjudicated in accordance with clause-19 of the Sale Agreement, which was never done. Instead, the Seller simply terminated the Sale Agreement and sold the Property to a third party without leading any evidence as to when such sale took place or the cost at which the Property was sold. The Seller therefore led no evidence as to when the refund payable by the Seller to the Buyers became due under clause-2 of the Sale Agreement.

60. In view of the aforementioned discussion, the Civil Court did not appreciate that the Sale Agreement comprised reciprocal promises and obligations. At a time when the Seller was in default of his own obligation to deliver possession of the Property by 31.12.2006, he could not seek to enforce the counter obligation of the Buyers to pay the entire sale consideration, especially when the Buyers had never refused to pay the balance sale consideration but had only asserted that the obligations to pay balance sale consideration was linked to the Seller's obligation to deliver possession of the Property. The Seller could also not derive a premium or benefit from its own wrong and while delaying the delivery of possession scheduled for

31.12.2006 claimed a penalty amount on the outstanding installments, the payment of which had been synchronized with the delivery of possession.

61. The question before the Court was whether the Seller was in default of his obligations or the Buyers were in default of their obligations or both parties were in default of their respective obligations under the Sale Agreement. The evidence as led by the parties established that the Seller acknowledged his inability to deliver possession of the Property up until 15.04.2012 constituting a delay of five years and four months from the period for delivery of possession stipulated in the Sale Agreement. This established default was ignored by the Civil Court. The Civil Court further did not appreciate that the obligation to pay the entire sale consideration was linked to the obligation of the Seller to complete the construction of the Property and deliver possession.

62. This Court therefore finds that the evidence as adduced before the Civil Court established that the Seller was in breach of his obligation to deliver possession of the Property on 31.12.2006, which possession he expressed his willingness to deliver on 15.04.2012. The Buyers may have also been in breach of making one or two installment payments due on 30.06.2006 and 30.09.2006 prior to the date of delivery of possession. It has been the Buyers' contention that discharge of such obligation was withheld as a self-help measure to demand performance from the Seller of his obligation to deliver possession. The argument has weight as in a construction project it can be

predicted on the basis of the stage of development and construction whether or not delivery of possession will come through at certain time. Given that the development and construction of the *Khudadad* Heights project was inordinately delayed for provided sufficient basis to the Buyers to withhold payment of 11th and 12th installments payments at a minimum. It is arguable that they could also have withheld the 9th and 10th installment payments in order to force counter-performance of the Seller's obligation to deliver possession at a time when it was evident that the delivery of possession was not a matter of weeks or months but years. The doctrine of exceptio non adimpleti contractus comes into play in such situation. The Buyers' bonafide reliance on such doctrine is supported by subsequent events as it was not for a further period of five years and four months that the Seller acquired the ability to deliver possession. And the delay in completion of the project could therefore not be attributed to the Buyers who had paid seventy five percent of the sale consideration by the time that they elected to withhold further discharge of their own obligations to force counter-performance by the Seller.

63. This Court therefore finds that the Civil Court erred in dismissing the suits for specific performance on the basis that the Buyers were in default of their obligations to pay balance sale consideration when letter dated 21.03.2012 issued by the Buyers very clearly provided that the Buyers were ready and willing to pay the balance sale consideration subject to delivery of possession with the proviso that the Buyers were claiming a set-off of the amount payable by them against the amount

payable by the Seller in lieu of market rent for delay in delivery of possession. The learned counsel for the Buyers under instruction from his clients, however, submitted that he was not seeking the setting aside of the judgments and decrees and was only seeking that the decretal amount awarded to the Buyers (i.e. three times the sale consideration paid by them up to the year 2006) be upheld. The counter argument of the Seller that the decretal amount (i.e. three times the sale consideration received by the Seller up until 2006) is unfair is without merit. It is established that the Buyers had paid approximately seventy five percent of the total sale consideration by the third quarter of 2006. It is also established that the Seller was in breach of his obligation to deliver possession on 31.12.2006. It is further established that the Seller waived his right to cancel the Sale Agreement pursuant to clause-2 of the Sales Agreement upon expiry of sixty days after refusal by the Buyers to pay the last few installment payments and only sought to assert such right on 15.03.2012 when the Notice of Readiness was issued, at which time he had already been in default of his obligation to deliver possession for a period of five years and four months. The right of the Buyers to restitution for breach by the Seller of his obligations under the Sale Agreement was therefore established. While determining the amount of restitution, the principle of balancing equities would come into play as enumerated by the Supreme Court in ***Muhammad Abdur Rehman Qureshi*** and ***Shaukat Ullah Khan Bangash.*** If the Civil Court had taken foreign exchange rate as a measure for restitution, the amount of sale consideration paid by 2006 would

come to Rs 24,392,295 in the year 2023. If the sale consideration paid by the Buyers was adjusted for inflation, the amount paid by the Buyers would equal Rs 30,464,080 at the present time. And if the rate of gold was used as a measure to calculate the time value for money, the amount paid by the Buyers would equal Rs 82,006,935 in 2023. The amount ordered to be reimbursed by the Seller to the Buyers (i.e. three times the sale consideration received up until 2006) which amount has admittedly been in the use and possession of the Seller ever since is significantly less than any of the more rational means that could have been utilized to determine the amount that ought to be paid by the Seller to the Buyers as a measure of restitution. Notwithstanding this, given that the Buyers have elected not to press their appeals to seek the setting aside of the impugned judgments and decrees and have sought instead, the decretal amount awarded by the Civil Court as an alternative to their prayers for specific performance pursuant to Section 19 of the Specific Relief Act, this Court will not interfere with the decretal amount awarded by the Civil Court, which has been found acceptable by the Buyers.

64. For the aforementioned reasons, R.F.As No.362, 368 and 369 of 2021 are ***dismissed*** and R.F.As No.372 to 377 of 2021 are ***allowed*** to the extent that the decretal amount determined by the Civil Court will be due and payable by the Seller to the Buyers in substitution of the Buyers' right to specific performance of the Sale Agreement. The respondents (i.e. Muhammad Sabir, Kashif Islam Sheikh and Khalid Islam Sheikh) in RFA No. 362, 368 and 369 of 2021, shall each be entitled to

cost of litigation in the amount of Rs 30,000/- payable by the appellant Amir Shahzad Khan, within a period of 30 days. Learned counsel for the appellant in RFAs No. 362, 368 and 369 of 2021 will file a compliance certificate with Deputy Registrar (Judicial) of this Court certifying that the order as to cost has been complied with.

65. Let the office share a copy of this judgment with the Member Inspection Team to be circulated to members of the District Judiciary through the District Judge (East) and the District Judge (West) for their information and to comply with the scheme of two-stage trial in suits for specific performance and breach of contract and related principles summarized under para 49 above.

(BABAR SATTAR)
JUDGE

Announced in the open Court on **09.06.2023.**

JUDGE

Approved for Reporting

A. Rahman Abbasi.

Annexure A

	R.F.A number	Case Title
1-	RFA No. 362 of 2021	Amir Shahzad Khan vs Muhammad Sabir
2-	RFA No. 368 of 2021	Amir Shahzad vs Khalid Aslam Sheikh & others
3-	RFA No. 369 of 2021	Aamir Shahzad Khan vs Kashif Islam Sheikh & others
4-	RFA No. 372 of 2021	Muhammad Sabir vs Chaudhry Muhammad Arif and others
5-	RFA No. 373 of 2021	Kashif Islam Sheikh vs Amir Shahzad
6-	RFA No. 374 of 2021	Muhammad Sabir vs Amir Shahzad
7-	RFA No. 375 of 2021	Khalid Islam Sheikh vs Ch Muhammad Arifand others
8-	RFA No. 376 of 2021	Khalid Islam Sheikh vs Amir Shehzad
9-	RFA No. 377 of 2021	Kashif Islam Sheikh vs Ch. Muhammad Arif and others