JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No.3761 of 2021
Sardar Muhammad Tariq Hayat
Versus
Ghulam Mujtaba, etc.

Petitioner by:	Mian Muhammad Zafar Iqbal, Advocate
Respondent no.1 by:	Rao Sabir Hussain, Advocate
Respondent no.2 by:	Mr. Ali Ijaz Buttar, Advocate
Date of Hearing:	**06.04.2022**

Sardar Ejaz Ishaq Khan, J: The petitioner assails the order dated 16.09.2021 passed by the learned trial Court allowing respondent no.1 to deposit the balance sale consideration in a suit for specific performance 10 months after the order to deposit the balance sale consideration was first made on the date the suit was filed.

2 The following chronology table tabulates the factual background:

02.12.2019	1st Agreement to Sell made between the appellant Seller, the home owner, and respondent no.1 Purchaser, a property dealer, for sale of house no. 1022, street no. 46, sector G-11/2, Islamabad ("suit property") for a sale consideration of Rs. 1 crore. Rs. 25 lacs paid as advance, the balance Rs. 75 lacs payable by the stipulated date was defaulted.
04.02.2020	2nd Agreement to Sell the suit property made between the same parties for Rs. 1 crore 20 lacs. Rs. 60 lacs recorded as the advance payment (though parties are at variance as to the actual advance paid – discussed later). The 2nd Agreement stipulated that the *Purchaser is bound to pay the balance sum of Rs. 60 lacs on 28.03.2020, failing which the Agreement shall be deemed cancelled and the advance payment shall be returned.* [1]
18.03.2020	Seller completed the formalities and obtained NOC for sale from the CDA.
28.03.2020	Due date for completion. The Purchaser defaulted in completing the sale transaction.
15.06.2020	Legal notice sent by the Seller, requiring the Purchaser to pay the balance sale consideration within 7 days and complete the

[1] Translated from Urdu.

	transaction. The Purchaser denies receipt of the notice.
17.11.2020	Purchaser filed the suit for specific performance of the 2nd Agreement to Sell, that is, about 7.5 months after the date fixed in the Agreement for full payment and completion of the transaction. Apart from vague assertions in paragraphs 7 to 9 of the plaint that the Purchaser approached the Seller to complete the transaction, there are no particulars given as to the date, time or witnesses of the offer for performance by the Purchaser, nor is there any reference to any legal notice or other written communication by the Purchaser to complete the sale on the stipulated date or at any date thereafter before the suit for specific performance was filed.
17.11.2020	The civil Court, while registering the Purchaser's suit for specific performance, passed the order for deposit of the balance sale consideration. It was not deposited.
07.01.2021	Service by publication ordered with direction to the Purchaser to deposit the process fee.
12.02.2021 12.03.2021 07.05.2021	The civil Courts did not function due to strike called by the Bar and due to Covid.
09.07.2021	Suit dismissed due to failure to deposit the process fee.
14.07.2021	Suit restored with fresh direction to deposit the process fee.
16.09.2021	Purchaser allowed to deposit the balance sale consideration on his plea that *he was not aware of the earlier order of 17.11.2020* to deposit the balance sale consideration, due to the death of his counsel's father.
03.11.2021	Purchaser deposited the balance sale consideration with the trial Court.

3 The Seller is now deeply aggrieved of the trial Court giving another opportunity to the Purchaser to deposit the balance sale consideration about 10 months after the suit was filed and the order made to deposit the balance sale consideration on the lame pretext that the Purchaser was not aware of the said order. The Seller's counsel cries foul because he says the current market value is now approximately twice the price stipulated in the 2nd Agreement, that the Purchaser craftily abused the process of the Court after defaulting on the date stipulated in the Agreement, that the equitable relief should not be extended to the Purchaser under the circumstances of this case

to give him a windfall of about 1 crore at the Seller's expense who, per the pleadings and the material on record, made every effort to complete the sale on time.

4 The Purchaser's counsel had no answer to the question why the Purchaser waited for 7.5 months after the date stipulated in the Agreement for payment of the balance sale consideration to file his suit for specific performance. He referred feebly to the clause of the Agreement that the Seller was meant to give vacant possession of the suit property to the Purchaser 15 days before completion of the sale, but not only the plaint is silent about this concocted reason, no mention was made of any document or letter to show that the Purchaser notified the Seller of the former's deferral to complete on the stipulated date due to the latter's alleged failure to deliver vacant possession.

5 Should the matter wait for a full-fledged trial for the Purchaser to establish that the Seller defaulted while the Purchaser was ready and willing to perform, and keep the property locked-in litigation to the detriment of a private individual who has this one house as one of his limited means, while the Purchaser qua a property dealer has this house as only one amongst several in his portfolio of business transactions in circumstances where the pleadings and the documents relied on show, on a balance of probabilities, that the Seller was trying to complete the transaction and it was the Purchaser who was delaying? I think not. I say so because the relief of specific performance requires utmost good faith – coming to the Court with clean hands – and the chronology table above says all but that the Purchaser has clean hands.

6 Punting (gambling) by property dealers is a common practice in our real estate market. The method is simple: pay down under an agreement to sell, dilly dally on completion, wait for the property prices to rise, find a buyer, get the higher price from the buyer, pay-off the seller at the original (lower) price, and pocket the difference. Fortunes have been made by this method, and much litigation spawned too. Many a times the sale to the 3rd party gets delayed beyond the completion date stipulated in the agreement to sell, and this is when the property dealers run to the courts, file suits for specific performance portraying as innocent victims of the vendors' refusal

to complete the sale, and get injunctions against sale by the owners. Sometimes they file the suit for specific performance in anticipation and keep the property locked-in for years to reap the entire upside on the rising property prices while paying the vendor only the originally agreed much lower sale price.

7 In any suit for specific performance, given the discretionary nature of the remedy, the Courts will do well to identify whether the purchaser is a professional property dealer, for in such case the Courts ought to be extra cautious that the equitable and discretionary relief is not abused.

8 Developed real estate markets include a 'proof of funds' statement in property sale transactions, and sale agreements are not made unless such a statement is included in the transaction documents. The near absence of this practice in our real estate market results in the Courts stepping in and filling the gap by directing deposit of the balance sale price on or about the time the suit for specific performance is filed. *Mst. Rehmat and others versus Mst. Zubaida Begum and others* (2021 SCMR 1534) is wrongly cited to claim that the purchaser must deposit the balance sale consideration at the time of filing the suit for specific performance. The Hon'ble Supreme Court found that the agreement to sell in that case did not contain a 'time of the essence' stipulation, and on that basis observed that *"[I]f balance sale consideration is not offered or paid earlier, best time to demonstrate such 'readiness and willingness to perform' is offering balance sale consideration at the time of filing suit for specific performance.*" Note the use of the word "offering".

9 *Hamood Mehmood versus Mst. Shabana Ishaque* (2017 SCMR 2022) is the most often cited case for the requirement to deposit the balance sale consideration at the time the suit is filed, for it did use the word "mandatory" for this requirement. But *Hamood Mehmood* was distinguished in *Muhammad Asif Awan versus Dawood Khan and others* (2021 SCMR 1270) by noting that "…*in the said case, the vendee/plaintiff despite decree had failed to deposit the balance sale price*" and that "…*the deposit of the sale consideration was directed by consent and against execution of the conveyance deed and the consequences of non-compliance was not the dismissal of the suit but vacation of the status quo order.*" *Hamood Mehmood* can therefore be said to be a case confined to its peculiar facts, and *Muhammad Asif,* together with *Mst.*

Rehmat, lays down, respectfully, the preferred legal position that the deposit of the balance sale consideration is not mandatory to be ordered on the date the suit is filed, and there is ample wisdom in this, as becomes apparent in the instant case.

10 There is one principle on which all decisions are unanimous, namely, that where the agreement to sell expressly stipulates '*time to be of the essence*' or, without using this expression, stipulates a fixed date for payment of the balance sale consideration and completion of the transaction with the consequence of nullifying the agreement for not doing so, that clause too makes '*time of the essence*' and, absent clear and objective evidence that the purchaser made a genuine attempt to pay the balance sale consideration on the stipulated date, the Courts will not extend the equitable relief to aid a lackadaisical purchaser under the guise of the 3 year limitation period to file a suit for specific performance to keep the seller and his property locked in litigation. On the principle that "contract is king", all decisions of the superior courts are unanimous. I have not found and nor has the respondent been able to identify any case where a clear stipulation making time of the essence has been disregarded by the Superior Courts to extend unwarranted indulgence to the purchaser. Several decisions can be cited for this principle, including *Adil Tiwana and others versus Shaukat Ullah Khan Bangash* (2015 SCMR 828), *Messrs Kuwait National Real Estate Company (Private) Limited and others versus Messrs Educational Excellence Limited and another* (2020 SCMR 171)[2], and *Mst. Samina Riffat and others versus Rohail Asghar and others* (2021 SCMR 7).

11 This is where the rub can be wrong if, without adverting to the stance of the defendant, the trial Court allows the plaintiff to deposit the balance sale consideration on the very first date the suit is filed, for it may result, as it did in this case, in the 'time of the essence' clause being overlooked and the plaintiff being given another chance to complete the transaction when, per the agreement to sell, he lost that opportunity on failing to complete on the stipulated date. This is what happened in this case, and this is what the petitioner/defendant complains of before this Court. The following passage from *Muhammad Asif* says it all:

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[2] Though a case for sale of a company's shares, the principles enunciated there are equally applicable to agreements to sell immovable property.

> …Section 24(b) of the Specific Relief Act, details the contracts which cannot be specifically enforced provides that specific performance of a contract cannot be enforced in favour of a person who has become incapable of performing or violates, any essential term of the contract that on his part remains to be performed. Therefore, the vendee while seeking specific performance/enforcement of a condition to be performed by the vendor must state that either he has performed all the conditions which under the contract he was bound to perform and/or that at all times right from the date of the agreement down to the date of filing the suit he has been ready and willing to perform/fulfill his part of the deal. He is not only supposed to narrate in the plaint his readiness and willingness at all material time to fulfill his part of the agreement but also is bound to demonstrate through supporting evidence such as pay orders, Bank statement or other material, his ability to fulfill his part of the deal leaving no doubt in the mind of the Court that the proceedings seeking specific performances have been initiated to cover up his default or to gain time to generate resources or create ability to fulfill his part of the deal. It is in that pursuit that the Court to weigh his capacity to perform and intention to purchase may direct the vendee to deposit the balance sale consideration. The readiness and willingness on the part of the vendee to perform his part of obligation also prima-facie demonstrates that the non-completion of the contract was not the fault of the vendee and the contract would have been completed, if it had not been renounced by the vendor. Reference can be made to the case of Abdul Hamid Vs. Abbas Bhai Abdul Hussain (PLD 1959 (W.P.) Karachi 629).(Emphasis supplied)

12 While entertaining suits for specific performance of agreements to sell, a trial Court ought not allow the deposit of the balance sale consideration without first scrutinising carefully the agreement to sell and identifying if there is a *prima facie* breach of clear stipulation making time of the essence for completion of the transaction. If it finds a clause making time of the essence, then it ought to scrutinize further the plaint and the documents annexed therewith to filter out vague pleas of the seller's refusal to perform versus solid averments and concomitant evidence, preferably documentary, demonstrating with adequate particulars, the purchaser's endeavours to complete the sale and the seller's refusal to perform, and only upon being satisfied on those particulars the direction to deposit the balance sale consideration should be made rather than in routine without adverting to the pleadings, noting that, the judgments of the Superior Courts on this topic cast the duty on the trial Courts to carry out this scrutiny while passing the order to deposit the balance sale consideration. If the trial Court is not satisfied at the filing stage on the foregoing factors, it can wait for the written

statement to be filed, examine the parties at the first hearing (per Order X Rules 1 and 2 CPC), and order the deposit of the balance sale consideration if satisfied that the pleadings and the documents annexed therewith demonstrate *prima facie* breach by the seller of the 'time of the essence' stipulations - *Muhammad Asif* is in point, for there the Hon'ble Supreme Court introduces flexibility for the stage at which the order to deposit the balance sale consideration may be made. Further still, the identity of the purchaser as a property dealer entering into the transaction as part of his business versus a seller of a home or a private investor, is one of the relevant considerations for the trial Court to take into account. This is not to say that property dealers are to be treated askance on all occasions, but that transactions made by way of business versus, say, selling a property other than in the line of business, place a heavier onus on businesses to demonstrate good faith and diligence to complete the transaction on time; property dealers being in for business alone can reasonably be expected to expend more resources on being meticulous with their paper trail including notices for completion and evidence of service and delivery thereof, and the instant case is one in point where the Purchaser, a property dealer, did not mention in his plaint sufficient particulars demonstrating his bona fide attempts to complete the transaction on the stipulated date. The trial Court may in appropriate cases pass an ad-interim injunction pending scrutiny of the pleadings, but the ad-interim injunctions should not be passed in routine, and ought to be vacated forthwith, if time is found to be of the essence and defaulted by the purchaser. Summarising, after *Muhammad Asif*, the trial Court is no longer mandated to order the deposit of balance sale consideration as a condition of entertaining a suit for specific performance, and should not do so where the result is to wipe out the purchaser's breach of the time of the essence stipulation forcing the seller to face the rigours of a trial for a prolonged period and keeping his property locked-in all the while.

13 I find that the Agreement to Sell in this case contained an unambiguous clause making time of the essence for payment of the balance sale consideration, that there is no *prima facie* evidence that the Purchaser made a genuine bona fide attempt to complete the sale on the stipulated date, that he waited for 7.5 months beyond the stipulated date to file his suit for specific performance, and that for the foregoing reasons the order of the

learned trial Court giving the Purchaser yet another chance about 18 months after the due date for completion per the Agreement to Sell an act of unwarranted indulgence which was unreasonable, improper and unsustainable on the authority of the judgments cited above upholding time of the essence clauses.

14 Resultantly, the impugned order dated 16.09.2021 permitting the Purchaser to deposit the balance sale consideration is set aside.

15 Per the Agreement to Sell, the Seller is obliged to return the advance payment received. There is a dispute as to the exact amount received. The Seller's pleadings state that the sum of Rs. 60 lacs recorded as advance received is incorrect, because the Purchaser insisted on that sum being recorded to show to the next buyer to whom the Purchaser, the property dealer, was going to "flip over" the suit property, and that the sum actually received was Rs. 31 lacs. It is not clear from the pleadings whether the Rs. 31 lacs admitted to have been received was over and above the Rs. 25 lacs received under the 1st Agreement to Sell, which would make the total advance received Rs. 56 lacs, or if the total received was 31 lacs, that is, 25 lacs under the 1st Agreement and 6 lacs under the 2nd. That is a factual dispute to be decided in the pending suit for cancellation of the Agreement to Sell filed by the Seller, where the Seller admits receipt of Rs. 31 lacs. The Seller will forthwith return the admitted sum of Rs. 31 lacs to the Purchaser, and the differential sum of Rs. 29 lacs shall be the subject of an issue to be framed in the said suit for cancellation to be decided by the trial Court on evidence, ensuring that the costs of litigation statements under section 35 of the Code of Civil Procedure, 1908, are duly filed by the parties in that suit and an order on costs is accordingly made by the trial Court on conclusion of the trial.

16 The office is directed to circulate a copy of this decision to the learned District Judges for onward circulation to all the subordinate courts for compliance with paragraph 8 of the judgment in *Muhammad Asif* reproduced in paragraph 11 above, and to keep in view the observations in paragraphs 11 and 12 of this judgment while registering the suits for specific performance of agreements to sell.

17 For this petition, the **award of costs** is in favour of the Seller/ petitioner. If he desires to recover his costs in this petition, he may file a statement of costs signed and sworn before an oath commissioner as to its truth and accuracy together with evidence of payment of fees to his counsel. The sworn statement of costs is to be filed with the Deputy Registrar (Judicial) and put up before the Court in chambers for assessment and award. The Seller/petitioner has 60 days to do so.

(Sardar Ejaz Ishaq Khan)
Judge

Imran

Announced in open Court on _____.

Judge

Approved for reporting.