ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Civil Revision no.25 of 2023
Gul Nabi Khan
Versus
Muhammad Ayub Khan Awan and others

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	28.03.2023	Sheikh Muhammad Suleman, Advocate for the petitioner

This civil revision petition is against two concurrent orders, dismissing the petitioner's application *qua* plaintiff for interim injunction restraining the respondents from alienating the suit property pending the trial in the suit for specific performance of agreement to sell. The petitioner *qua* plaintiff was the purchaser and respondent no.1 *qua* defendant no.1 was the seller of a house under an agreement to sell dated 27.01.2021. When the buyer did not pay the balance sale consideration by the agreed date of 27.02.2021, a *Jirga* was held, as a result of which another agreement dated 12.04.2021 was signed between the parties. The balance sale consideration under the second agreement was due by 23.05.2021. This second agreement used firm language in respect of the balance sale consideration and the consequences of non-payment thereof within the stipulated timeframe as follows:

اگر فریق دوئم خود ہی بقایا ادائیگی سے قاصر رہا تو رقم وصول کردہ بیعانہ ضبط ہو گی۔ اور سودا منسوخ تصور ہو گا۔
(نوٹ: مذکورہ طے شدہ ٹائم آخری تصور ہو گا اس کے بعد فریق دوئم کو مزید وقت ہر گز نہ دیا جائے گا)

2 The buyer did not pay the balance sale consideration within the stipulated timeframe under this second agreement either.

3 Very soon thereafter, the seller by his legal notice dated 08.06.2021 notified the buyer that resultantly the agreement to sell stood cancelled, the earnest money stood forfeited, and the seller was free to sell the house to a third party. No comments are made as to the actual receipt or admissibility of the said legal notice but, because

this legal notice is appended to the record, it is assumed that this is an admitted document.

4 Six months later, the buyer filed the suit. The civil court while entertaining the suit allowed the buyer to deposit the balance sale consideration, which he did in April 2022. The civil court passed this order without due attention to the terms of the agreement to sell and without submissions in rebuttal being properly recorded.

5 The injunction application was then transferred to the pairing court under the 2020 amendments to the Civil Procedure Code. The learned civil court dismissed the application under Order 39 Rules 1 and 2 CPC, finding on a *prima facie* basis, that time was of the essence of the agreement, and citing a judgement of this Court in Writ Petition no.3761/2021 *(Sardar Muhammad Tariq Hayat vs Ghulam Mujtaba)* that where time appeared to be of the essence of the agreement, the trial court should not condone the breach of such stipulation in the agreement of the parties by permitting the deposit of balance sale consideration, and that the court was not entitled to extend the time period stipulated by the parties themselves for performance of the contract. The buyer's appeal before the Additional District Judge was also dismissed for similar reasons. Hence this civil revision.

6 After the 2020 amendments to the Civil Procedure Code, the earlier grounds of civil revision, namely, failure or improper exercise of jurisdiction or illegality or material irregularity, stand replaced with the grounds of an obvious misapprehension of law or defect in jurisdiction. The defect in jurisdiction not being in contest, the question before this Court is whether the impugned orders proceeded on an obvious misapprehension of law.

7 Learned counsel was questioned as to why should the stipulation reproduced in *Urdu* above not be regarded as a clear stipulation of time being of the essence. Learned counsel cited several judgements holding that ordinarily time is not of the essence in agreements of sale of immoveable property, but this principle is

subject to a contract to the contrary[1]. Further, the judgement cited by the learned counsel himself, namely, *Mrs. Zakia Hussain*[2], records that the facts and circumstances of each case are the determining factors to hold whether time was the essence of the contract or not. Learned counsel laid much emphasis on *Raja Muhammad Naseer*[3] case to argue that mere mention of a specific period in an agreement for completion of sale does not *ipso facto* make time of the essence. This indeed is the correct statement of law. It is to be noted that in *Raja Muhammad Naseer*, the extension of time by a subsequent agreement and the parties' conduct therein, especially the seller's own conduct in preventing the completion of sale, were material considerations for the court to conclude that the time was not of the essence. But the said law report does not mention whether the express language in the subsequent agreement of the nature present in the instant case was present there or not. It appears that it was not, or else it would have been mentioned. The law report simply records a mere mention of a date for completion of sale, by which the presumption would be that no additional language making time of the essence was found in that case. Paragraph 9 of that judgement bears reproduction:

> In the case of "Mst. Amina Bibi v. Mudassar Aziz" (PLD 2003 Supreme Court 430) the Hon'ble Apex Court, while dealing with the similar proposition outlined the scope of section 55 of The Contract Act, 1872 and laid down certain guidelines in the following manner:-
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> 13. It is well-settled that intention to make time of the essence of the contract must be expressed in unmistakable language and it may be inferred from what passed between the parties before, but not after, the contract is made. A mere mention of a specified period in an agreement for completion of sale has been held as not to make the time of essence of the contract. In contracts of sale of immovable property, ordinarily, time is not considered to be of essence of the contract unless it was expressly intended by the parties and the terms of contract do not permit of any other interpretation. (emphasis supplied)

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[1] *Mst. Jaiwanti Bai v M/s Amir Corporation and others (PLD 2021 SC 434)*
[2] *Mrs. Zakia Hussain and another v Syed Farooq Hussain (PLD 2020 SC 401)*
[3] *Raja Muhammad Naseer and another v Ghulam Shah and another (2018 CLC 1769)*

Raja Muhammad Naseer was a case where the trial had concluded and the entire evidence was led and the revisional court observed at paragraph 8 that "[A]fter having an analysis of the available material as discussed above, I am of the considered view that time was never essence of the agreement".

8 The case before me, however, is against an interim order in a trial where the evidence is yet to be led, and the learned trial court is yet to decide whether time was of the essence or not. At this stage the material before me, in particular, the language reproduced in *Urdu* above, necessitates that the *prima facie* view be taken that the parties did intend time to be of the essence by implying such emphatic language.

9 Learned counsel also cited several other judgements, but they are all to the effect that the civil court can extend the time granted by it under section 148 CPC, but that is not the proposition before me, because what is in question is not the time granted by the court, but the time fixed by the parties for the performance of the contract, and no one including the court but the parties have the legal capacity to extend the time agreed in a contract for the performance of their respective obligations. Resultantly, those judgements also have no bearing on the question at hand.

10 Resultantly, I cannot conclude that the orders impugned before me were based on any obvious misapprehension of law. This civil revision petition is therefore **dismissed**.

11 It is however observed, citing the judgement of this Court titled *Mrs. Nazia Sohail vs. Mst. Iqbal Begum and another*[4] that the decision in this civil revision will have no bearing on the civil court while deciding the main suit.

(Sardar Ejaz Ishaq Khan)
Judge

Fazal Elahi

[4] *2016 MLD 1403*