**JUDGMENT SHEET**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**

**R.F.A. No. 15 OF 2024**

**IJAZ ALI**

**VS**

**MUHAMMAD SHAFI KHAN AND OTHERS**

**Petitioner by : Mr. Zubair Aslam, Advocate.**

**Respondents by : Mr. Tauqeer Hafeez Abbasi Advocate for Respondent No.1**
**Mr. Sarwar Anwar Dar for respondents No.2 & 3.**

**Date of hearing : 05.05.2025**

**MUHAMMAD AZAM KHAN, J.**

**1.** Through the instant appeal, Appellant/Defendant No. 1 has called into question the propriety and legality of the Judgment and Decree dated 31.10.2023 **(Impugned Judgment and Decree")** passed by the learned Civil Judge I$^{st}$ Class, Islamabad-West, whereby the suit filed by the Respondent No. 1/Plaintiff for specific performance of the Agreement dated 06.10.2011, and for Mandatory and Permanent Injunction, was dismissed. However, the Appellant/Defendant No. 1 was directed to pay an amount of Rs.15,000,000/- to the Respondent No. 1/Plaintiff as enhanced earnest money.

**2.** Brief facts leading to the filing of the instant appeal are that Respondent No. 1/Plaintiff instituted a suit for specific performance of an alleged Agreement to sell dated 06.10.2011, along with reliefs of Permanent and Mandatory injunction. The Appellant/Defendant No. 1 appeared before the learned Trial Court and submitted his written statement contesting the claim. Both parties led their respective evidence. Ultimately, the learned Trial Court dismissed the suit to the extent of specific performance, permanent injunction, and mandatory injunction, but partly decreed it by awarding a money decree in the sum of Rs.15,000,000/- in favour of the Respondent No. 1/Plaintiff, an amount alleged to be ten times the earnest money. Under the terms and conditions of the Agreement dated 06.10.2011, the Respondent No. 1/Plaintiff was obligated to

pay an additional amount of Rs.500,000/- within two months of the execution of the Agreement, which he failed to do. He also failed to pay the remaining sale consideration. As a result, the plot was subsequently cancelled in the name of the Appellant/Defendant No. 1. At the time of such cancellation, the Appellant/Defendant No. 1 offered to return the earnest money to the Respondent No. 1/Plaintiff, but the latter declined to accept it and instead lodged two false FIRs against the Appellant/Defendant No. 1 as a means to exert undue pressure. Furthermore, the Respondent No. 1/Plaintiff allegedly manipulated the preparation of a second Agreement dated 05.09.2013, even though at that time, the plot in question was no longer allotted in the Appellant/Defendant No. 1's name, and no further consideration had been received. The Appellant/Defendant No. 1, in his examination-in-chief, categorically stated that he was, and still is, willing to return the original earnest money to the Respondent No. 1/Plaintiff, but the latter deliberately refused to accept it, opting instead to initiate litigation with *mala fide* intent. The Respondent No. 1/Plaintiff failed to perform his contractual obligations under the initial Agreement dated 06.10.2011, and subsequently declined to receive the refund of earnest money from the Appellant/Defendant No. 1. Thus, according to the Appellant/Respondent No. 1 the award of an exorbitant amount of Rs.15,000,000/-, being ten times the earnest money, is not only excessive and unjustified but also contrary to settled principles of law and equity, and has gravely prejudiced the rights of the Appellant/Defendant. Hence, the Appellant/Defendant No. 1 has preferred the present Appeal.

**3.** Learned counsel for the Appellant/Defendant No. 1 argued that specific performance is a discretionary relief, and discretion must be exercised judiciously. However, the learned Trial Court failed to consider the Respondent No. 1/Plaintiff's failure and passed the Impugned Judgment and Decree directing payment of an amount ten times higher than the actual earnest money, which is unsustainable. He further submitted that the findings of the learned Trial Court regarding the enhanced return of earnest money are illegal and biased; that the Trial Court overlooked the Respondent No. 1/Plaintiff's failure to perform his part of the contract; and that the Impugned Judgment and Decree is untenable in law and liable to be reversed.

**4.** On the other hand, learned counsel for the Respondent No. 1/Plaintiff supported the Impugned Judgment and Decree to the extent of return of earnest money at the enhanced rate and prayed for dismissal of the appeal with costs.

**5.** Arguments heard. Record perused.

**6.** A careful perusal of the record reveals that Respondent No. 1/Plaintiff has not filed any appeal against the dismissal of the suit, therefore the Impugned Judgment and Decree to that extent has attained finality. It is admitted that the Agreement dated 06.10.2011 has not been performed. The Respondent No. 1/Plaintiff claimed that he paid an amount of Rs.1,500,000/- and Appellant/Defendant No. 1 in his written statement admitted receipt of the earnest money in accordance with the Agreement but the same has not been returned to the Respondent No. 1/Plaintiff and the Agreement had been canceled by the parties. During the cross-examination, the Appellant/Defendant No. 1 admitted that he did not return the earnest money to Respondent No. 1/Plaintiff. However, during the examination-in-chief Appellant/Defendant No.1 deposed that only an amount of Rs.890,000/- was paid to him as earnest money while the remaining amount of Rs.1,500,000/- was taken by the dealers, however, the said statement is contradictory to his pleadings, so the same could not be taken into consideration. The fact remains that execution of the Agreement dated 06.10.2011 and receiving of Rs.1,500,000/- has not been denied by Appellant/Defendant No.1, so the Respondent No. 1/Plaintiff was not under obligation to prove the said facts in accordance with Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984. The record reveals that to the extent of payment of the remaining alleged amount of Rs.700,000/- and his readiness to perform the Agreement, Respondent No. 1/Plaintiff had to prove the same by presenting cogent and confidence inspiring evidence which he failed to do. Although in support of remaining earnest money Respondent No. 1/Plaintiff has produced an affidavit dated 02.09.2013 allegedly sworn by Appellant/Defendant No.1 as Ex.P.5 but neither he produced any supporting witness nor presented any other evidence which could reflect the payment of said amount. It is a settled proposition of law that a document could only be proved by producing two marginal witnesses and scribe of that document but in the matter at hand though Appellant/Defendant No.1 has not disputed the signature and thumb impression

on Ex.P.5 but he categorically stated that his signature was obtained on blank stamp paper under coercion and with *mala-fide* intention. In such circumstances, it was obligatory upon Respondent No. 1/Plaintiff to prove execution of Ex.P.5 but he failed to produce any tangible and reliable evidence to prove the same.

**7.** Respondent No. 1/Plaintiff himself admitted that Plot No.383-B has already been canceled from the name of the Appellant/Defendant No.1, so it can safely be observed that the subject matter of the Agreement dated 06.10.2011 ceased to exist so no performance could be ordered in respect of the said Agreement. So far as the Agreement dated 05.09.2013 is concerned the Appellant/Defendant No.1 although did not dispute his signature and thumb impression on the same however, specifically contended that the signature and thumb impression were obtained on blank stamp papers under coercion and he denied the same. Since the execution of the Agreement dated 05.09.2013 was denied by the Appellant/Defendant No. 1, so the Respondent No. 1/Plaintiff was duty bound to prove the execution of the said Agreement in accordance with law but the Respondent No. 1/Plaintiff failed to prove the same by producing two witnesses in terms of Article 79 of the Qanun-e-Shahadat Order, 1984.

**8.** From the record it is clear that the first Agreement dated 06.10.2011 was not denied by the Appellant/Defendant No.1 and he admitted the receiving of Rs.1,500,000/-, therefore, it was rightly concluded by the learned Trial Court that the Appellant/Defendant No.1 had received an amount of Rs.1,500,000/- as earnest money on 06.10.2011 and till date he did not return it to the Respondent No. 1/Plaintiff. Although Respondent No. 1/Plaintiff has been held not entitled for specific performance of the Agreements but he is entitled for a refund of his paid earnest money along with depreciation of his money as the same remained in the use of the Appellant/Defendant No.1 since October 2011. The Appellant/Defendant No.1 was allotted plot No.235 in lieu of his build-up property, so he was under a moral obligation to transfer the said plot in favour of Respondent No. 1/Plaintiff, however, he not only concealed the allotment of the said plot from the Respondent No. 1/Plaintiff but he sold out the same to another person.

**9.** No logical justification is forthcoming as to why the Appellant/Defendant No. 1 did not return the earnest money of Rs.1,500,000/- to Respondent No. 1/Plaintiff. The Courts have consistently upheld principles of fairness and equity in civil disputes, particularly concerning property transactions where one party dishonestly sells property to another despite receiving earnest money from the first buyer. The Court emphasizes the importance of upholding contractual obligations and protecting the rights of parties who have acted in good faith. The Courts have affirmed that specific performance of a contract can be granted even in the presence of a double earnest money clause, provided the party seeking enforcement demonstrates readiness and willingness to perform the contract. In notable cases, the Court upheld the lower Courts' decisions granting specific performance to a buyer who had paid earnest money and filed a suit promptly after the seller failed to execute the sale deed. In instances where a seller dishonestly sells the property to another party at a higher price, the Courts have emphasized that such actions cannot override the rights of the original buyer who has fulfilled their obligations. The Court has to consider the conduct of the parties and the presence of any fraudulent intent when determining the validity of subsequent transactions. The learned Trial Court rightly noted that during the intervening period, there was substantial appreciation in the market value of property. The Appellant/Defendant No. 1 enjoyed the capital gains from the sale of the subsequent plot, indirectly arising from the original transaction. The enhancement of the refund to Rs.15,000,000/- reflects the real loss suffered by Respondent No. 1/Plaintiff and the unjust gain by the Appellant/Defendant No. 1. Even if the contract was unenforceable for specific performance, Respondent No. 1/Plaintiff was entitled to compensation for loss sustained due to the Appellant/Defendant No. 1's breach. The enhanced amount falls well within the spirit of Sections 73 and 74 of the Contract Act, 1872 as it considers consequential loss and the time value of the property. It is settled law that Courts, particularly in suits involving specific performance retain discretion to mold the relief in a manner that prevents unjust enrichment and promotes good conscience. Reliance is placed on *Messrs Ghulam Haider & sons Vs Abdul Wahid* **(PLD 2009 SC 879)** and *Mrs Humaira Begum Vs Abdul Hameed* **(PLD 2010 Karachi 68)**. Both cases uphold the principle that courts may grant

monetary compensation even in the absence of a decree for specific performance especially where the seller acted in bad faith.

**10.** Admittedly, the Appellant/Defendant No. 1 utilized the said amount for more than a decade therefore, the learned Trial Court was justified to order the return of the earnest money at an enhanced rate keeping in view the rule enunciated in **2017 SCMR 902, 2018 CLC 648** and **2010 SCMR 1507**. The finding of the learned Trial Court in this regard is based on well-settled and in accordance with the principles of equity and restitution. The Appellant/Defendant No. 1 retained a significant sum of money without any legal entitlement for more than a decade. The unjust enrichment of the Appellant/Defendant No. 1 at the cost of the Respondent No. 1/Plaintiff cannot be condoned. The enhanced amount directed to be refunded is not merely punitive but is a reasonable quantification of loss and deprivation suffered by the Respondent No. 1/Plaintiff, keeping in mind the economic value of money over time. This Court finds no perversity or illegality in the findings recorded by the learned Trial Court. The conclusion reached vide the Impugned Judgment and Decree is supported by sound reasoning and does not call for any interference by this appellate court

**11.** For the foregoing reasons, the instant Appeal being devoid of any merit is hereby **dismissed**. There shall be no order as to costs.

**(MUHAMMAD AZAM KHAN)**
**JUDGE**

**Announced in the open Court on this _____ day of May 2025.**

**JUDGE**

***//Sajid//****