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

R.F.A. No. 22of 2013

Sabir Hussain
Versus
Sajid Pervazi Minhas and others.

Appellant by	:	Mr. Ajmal Raza Bhatti, Advocate.
For Respondent No. 1	:	Mr. Wajid Hussain Mughal, Advocate
For Respondent No. 2		Mr. Fazal-e-Maula, Advocate.
For Respondent No. 3		Mr. Muhammad Akram Shaheen, Advocate.
Date of Hearing	:	19.04.2023

ARBAB MUHAMMAD TAHIR,J.:-This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 *(hereinafter referred to as **"C.P.C.")*** is directed against the judgmentand decree dated 30.07.2012passed by the learned Civil Judge 1st Class, Islamabadwhereby suit for specific performance, permanent and mandatory injunction filed by the respondent No. 1 namely Sajid Pervaiz Minhas was decreed as prayed for. The operative part of the impugned judgment contained in paragraph No. 5 reads as under:-

> *"To the extent of the agreement all the witnesses deposed that the three above mentioned agreements were executed qua the parties. Even the defendants also produced three witnesses namely Ulfat Hussain D.W-1, Liaqat Hussain D.W-2 and Muhammad Sheraz D.W-3, they even did not deny the agreement. Even Muhammad Sheraz D.W-3 appeared and deposed that if the plaintiff deposits the remaining sale consideration, they would not have any o0bjection regarding the transfer of the suit plot in his name. So far as the contention of defendant that the plaintiff failed to deposit the balance consideration amount of Rs. 1,17000/- is concerned, the defendant failed to bring anything on the record which may show that the plaintiff failed to deposit the remaining balance price within stipulated time period. Even they failed to prove that the plaintiff did not pay the remaining balance consideration even after lengthy cross examination at plaintiff's witnesses. In the light of above discussion whereof, this issue is decided in favour of plaintiff."*

2- The listed appeal was initially filed before the District Judge, Islamabad on 10.10.2012 but subsequently returned on 28.01.2013 for its presentation before the proper forum due to lack of pecuniary jurisdiction. I was then filed before this Court on 06.02.2013. The appeal was dismissed vide order dated 28.01.2016 on the ground that fresh memo of appeal was filed instead the original one, filed before the District Court. The said order dated 28.01.2016 was challenged before the Supreme Court of Pakistan vide Civil Petition No. 1008/2016 which was allowed vide order dated 21.01.2021 with direction to this court to proceed with the appeal in accordance with law.

3- Precisely, facts relevant for adjudication of the instant appeal are that the appellant was offered a residential plot No. 294, measuring 35'x70', situated at Sector D-12, Islamabad ('**suit plot'**) by the Federal Government Employees Housing Foundation, Islamabad/Respondent No. 2 and for making payment of the same, he entered into an agreement with the respondent No.1 dated 18.09.2002 ('**the first agreement**' – *Ex. P1*) wherein the appellant was bound to consult the respondent No. 1 in case he intends to sell the property. Both the parties later entered into another agreement dated 10.05.2004 ('**the second agreement**' – *Ex. P2*) wherein the value of the property was mentioned to the tune of Rs. 29,00,000/- having equal share i.e., Rs. 14,50,000/- each; that the respondent No. 1 paid the earnest amount of Rs. 5,50,000/- whereas the remaining amount of Rs. 9,00,000/- was agreed to be paid within next 10 days; that it was agreed between the parties that on payment of share, the respondent no.1 shall be entitled for the transfer of the property in his favor. The last and final agreement was executed between the parties on 20.09.2004 ('**the third agreement**' – *Ex. P3*) stipulating that the respondent No. 1 has paid an amount of Rs. 13,50,000/- whereas the remaining amount of Rs. 1,00,000/- will be paid at the time of transfer of the property in his favor. However, despite the willingness of respondent No. 1 to pay the remaining Rs. 1,00,000/-, the appellant never transferred the property

in the name of the respondent no. 1 hence, the respondent No.1 filed the suit on 23.09.2011.

4- In response to notice, the appellant entered appearance and contested the suit by filing written statement wherein he controverted the claim of the respondent No.1, on factual as well as legal grounds. The learned Trial Court, then out of the pleadings of the parties, framed following issues on 30.10.2003;

1. Whether the plaintiff is entitled to get the decree as prayed for? OPP
2. Whether the plaintiff has no cause of action to bring this suit? OPD
3. Whether the plaintiff has filed a false and frivolous suit against the defendant? OPD
4. Relief.

5**-** In evidence, the plaintiff/respondent No. 1 himself appeared as PW-1; one *Azhar Mehmood Butt*, witness of the first and second agreement, appeared as PW-2 and one *Muhammad Naseer Minhas*, witness of the third agreement, appeared as PW-3 whereas the special attorney of the defendant/appellant, the son of appellant, namely *Ulfat Hussain* appeared as DW-1. The other son of the appellant, the witness to second and third agreement, namely *Liaquat Hussain* appeared as DW-2 and one *Muhammad Shahzad* appeared as DW-3. The documentary evidence includes the three agreements Ex P1, Ex P2 and Ex P3 and receipts of deposit of amounts in the National Bank of Pakistan Mark-A to Mark-A/1-3.The learned Trial Court after hearing learned counsel for the parties decreed the suit as prayed for, hence instant appeal.

6- Learned counsel for the appellant argued that the appellant submitted transfer form in favor of the respondent No. 1 before the CDA/Respondent no. 3 pursuant to the execution of third agreement however, due to non-payment of remaining amount, the transfer form stood expired and thereafter the appellant sold out the property to third party; that as a matter of fact, the appellant never sold the property to the respondent No. 1 rather entered into investment agreement through which the respondent No. 1 was made entitled to

50% of the profit and not the whole property; that the suit plot had to be sold to third party on profit and the sale proceed had to be divided amongst the parties in equal share. The learned counsel further argued that since the time was essence of contract, on failure to fulfill his contractual obligations, the amount paid by the respondent no. 1 stood forfeited and the agreements terminated. It is added that the respondent No.1 has failed to deposit the balance sale consideration in the Court, therefore, cannot ask for the specific performance of the agreements.

7- On the other hand, learned counsel for the respondent No.1 repelled the above submissions by contending that the evidence on record including the statement of the appellant clearly establishes the execution of the three agreements; that the appellant not only admitted the execution of the agreements but also admitted the receipt of sale consideration while the allegation that the respondent No.1 failed to pay the remaining sale consideration is without any substance as the said respondent, soon after refusal of the appellant to transfer the suit plot in the name of the respondent No.1, filed the instant suit, therefore, the impugned judgment and decree are not open to any exception and appeal is liable to dismissed.

8- Heard the learned counsel for the parties and perused the record with their able assistance.

9- Perusal of record reveals that the witnesses of the appellant namely Ulfat Hussain DW-1 as well as Liaqat Hussain DW-2 in their respective statements admitted to have received Rs. 13,50,000/- as sale consideration and that only an amount of Rs. 1,00,000/- was due towards the respondent No. 1. They further admitted execution of the three agreements and reiterated that had the respondent No. 1 paid remaining consideration of Rs. 1,17,000/- they would have transferred the property in his favor. These admissions on the part of the appellant

lend support to the claim of the respondent No.1, set in the pleadings as well as his statement.

10- The main stance of the appellant is that the respondent No.1 has failed to pay the remaining sale consideration within time, therefore, cannot ask for the specific performance of the agreements. In order to appreciate the stance of the appellant, the pleadings as well as the evidence particularly the statement of DW-1, the witness of the appellant has been gone through.

11- On the aspect of non-payment of remaining sale consideration within the stipulated timeframe, the claim of the respondent No. 1 is at variance as in Para 4 of the written statement, it was pleaded that after fulfilling the necessary requirements, the appellant submitted transfer form in favor of the respondent No. 1 in the CDA but after the period of three months, the respondent No. 1 could not pay remaining price of the suit plot thereafter the transfer form stood expired so the respondent No. 1 had no right to seek specific performance. As per this stance, the transaction had to be completed within three months while as per the statement of *Ulfat Hussain* – DW-1, special attorney/son of the appellant, the balance sale consideration was Rs. 1,00,000/- and that at the time when the sale agreement was executed the remaining amount had to be paid within one month. Thus, there is divergence on this aspect which, if seen in conjunction with the facts, highlighted by the respondent CDA in its written statement, leaves no room but to observe that the claim of the appellant that the respondent No. 1 had to pay the balance sale consideration within one month is nothing but an attempt to evade the responsibility, laid upon him under the agreements.

12- Looking this aspect of the matter from another angle, the stance of the appellant seems to be dubious also for the reason that as per appellant's stance, through the statement of DW-1,after the agreement, the deal had to be finalized within a period of one month

but as per the stance of respondent CDA, the appellant obtained the Transfer Application Form in favor of the respondent No. 1 on 10.01.2004 that stood expired on 10.04.2004. This event happened much before the execution of the last agreement which is an admitted document and as per appellant's own stance, the deal had to be finalized within one month. The time limit for transfer in the name of the respondent No. 1 expired on 10.04.2004 while the last agreement entered into between the parties was made on 20.09.2004 after about five months of the expiry of the transfer form on 10.04.2004. The ground of default in making payment of remaining sale consideration within the stipulated period attributed to the respondent No. 1 is not only at variance but is negated by the evidence on record and is, therefore, repelled.

13- Adverting to the submission made by learned counsel for the appellant that as the respondent had failed to deposit the remaining sale consideration in the court therefore, cannot ask for specific performance of the agreement. The deposit of the sale consideration or balance consideration is not an automatic requirement but there must be an order of the court for deposit of the same. Reliance is placed upon the case of *"Messrs DW Pakistan (Private) Limited, Lahore versus Begum Anisa Fazl-i-Mahmood & others"* (**2023 SCMR 555**). No such order has been pointed out by the learned counsel for the appellant.

14- Although the appellant pleaded that the agreement had to be completed within one month of its execution but the agreement itself did not contain any such clause and likewise no penal clause entailing consequences regarding its non-performance is stipulated therein. It can therefore not be said that in the present case, the time was essence of the contract. There was no specific clause in the agreement that in case of its non-completion within a particular time it would be deemed to have been cancelled. Reliance is placed upon case of *"Mst. Gulshan Hamid versus Kh. Abdul Rehman & others"* (**2010 SCMR 334**).

15- The sequel of above discussion is that the witnesses of the appellant i.e. DW-1 and DW-2 have admitted the payment of Rs. 13,50,000/- as sale consideration for the suit plot, also admitted the execution of the three agreements, as per the final agreement the remaining sale consideration had to be paid at the time of transfer of the suit plot to the respondent no. 1, there was no time limit prescribed for completion of the agreement, no consequences were provided for the non-payment of sale consideration within any particular time, there was reciprocal promise whereby the respondent No. 1 is to pay the remaining amount and for the appellant it was obligatory to arrange for the transfer of the suit plot in favor of respondent No. 1 who expressed willingness which can also be witnessed from the fact that after the execution of last agreement in September, 2004 he immediately filed the instant suit in April, 2005.

16- In view of above, the impugned judgment and decree is not open to any exception. The instant appeal is therefore, accordingly**dismissed**.

(ARBAB MUHAMMAD TAHIR)
JUDGE

Announced in open court on_____05.2023

JUDGE

//Kamran//