Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

RFA No. 51 of 2013

Abdus Salam Khan Barki, etc.

Vs

Mian Pervaiz Akhtar, etc.

APPELLANTS BY:	Mr. Muhammad Umer Raja, Advocate.
RESPONDENTS BY:	Mr. Zulfiqar Khalid Maluka and Raja Mazhar Ali, Advocates.
DATE OF HEARING:	22.02.2022.

==========

BABAR SATTAR, J.- The appellants have impugned order dated 13.03.2013 pursuant to which suit for specific performance filed by the appellants was dismissed by the learned Civil Court.

2. The appellants had sought specific performance of agreement dated 01.12.2011 pursuant to which the respondents were required to transfer certain property mentioned therein **("Suit Property")** subject to payment of consideration within a prescribed period. The agreement provided that the obligation would be performed by or before 13.01.2012 and also provided penal consequences in the event of failure of the parties to perform their respective obligations within the period prescribed. Such penal consequences, included forfeiture of the earnest money paid by the appellants to the respondents in the event of failure of the appellants to pay balance consideration within the

period prescribed. The suit was filed on 10.01.2012 and ad-interim injunction was also issued in favour of the appellants by order dated 11.01.2012. In its order dated 14.12.2012 the learned Civil Court noted that both parties seemed ready to perform the agreement in accordance with its terms and had directed the appellants to deposit the entire consideration of the suit land at the rate of Rs.1,100,000 per kanal excluding the amount already paid as earnest money. The learned Civil Court directed the respondents to transfer the land in the name of the appellants by 15.02.2012 after deposit of sale consideration by the appellants. It also observed that in the event of default of either party the punitive provisions provided in the sale agreement dated 01.12.2011 could be given effect by the parties. The learned Civil Court also appointed a local commission to facilitate the transfer of land to the appellants. By order dated 14.01.2013 the learned Civil Court enlarged time for payment of balance consideration and once again directed the appellants to deposit sale consideration in lieu of 36 kanals and 13 marlas of land with the court and upon deposit of sale consideration directed the respondents to transfer the said 36 kanals and 13 marlas of land in favour of the appellants. The appellants failed to deposit the balance sale consideration pursuant to orders dated 14.12.2012 and 31.01.2013. In its judgment the learned Civil Court observed that some of the land that was subject of sale agreement had been sold by the respondents to a third party and such sale was not in breach of the agreement to sell dated 01.12.2011. And that the Suit Property could not be transferred by the respondents to the

appellants due to the appellants' failure to pay the balance consideration to the respondents. It held that the appellants had been directed pursuant to orders dated 14.01.2012 and 31.01.2013 to deposit the balance consideration with the court but no amount had been deposited despite the fact that major portion of the Suit Property could be transferred by the respondents to the appellants who was ready and willing to make such transfer. The learned Civil Court held that it was due to the failure of the appellants to deposit remaining balance consideration with the court despite grant of opportunities that the suit was liable to be dismissed under Order XVII Rule 3 of CPC and consequently issued a decree dismissing the suit of the appellants. The appellants then filed the instant appeal.

3. Learned counsel for the appellants submitted that the judgment and decree had been passed under Order XVII Rule 3 of CPC for non-deposit of balance sale consideration by the appellants in compliance with a direction of the learned Civil Court. That it was the appellants' claim that the balance sale consideration could not be paid due to breach of obligation by the respondents and thus the learned Civil Court ought not have passed a direction to deposit the balance sale consideration. That while passing the impugned judgment and decree the learned Civil Court did not take into account the law laid down by the august Supreme Court in ***Muhammad Asif Awan Versus Dawood Khan (2021 SCMR 1270)*** in which the august Supreme Court had held that a party seeking specific

performance of an agreement could not be non-suited for non-deposit of balance sale consideration with the Civil Court.

4. Learned counsel for the respondents submitted that it was now settled law that a party seeking specific performance of an agreement for sale of immovable property was under an obligation to itself seek to deposit with the court the sale consideration due in lieu of the property in question. He submitted that the learned counsel for the appellants was misinterpreting the law laid down in ***Muhammad Asif Awan***, wherein the august Supreme Court had essentially ruled that it was within the jurisdiction of the learned trial court to grant extension for payment of balance sale consideration but it also reiterated that the court was within its rights to ensure that the party seeking enforcement of an agreement to sell had the ability and the intention to discharge its obligations under the agreement. He submitted that in the present case the appellants had failed to deposit the balance sale consideration even after the direction to such effect had been issued by learned trial court and such conduct manifested that the appellants neither had the ability nor had the intention to discharge his obligations under the agreement the enforcement of which he was seeking and consequently the learned Civil Court rightly dismissed the appellants' suit.

5. The Specific Relief Act, 1877 in sections 12 and 22 provides that specific performance of a contract constitutes discretionary relief, which discretion is to be exercised by the

court in pursuit of fairness and justice in a reasonable manner. Sections 12 and 22 state the following:

> ***12. Cases in which specific performance enforceable****.– Except as otherwise provided in this Chapter, the specific performance of any contract may in the discretion of the Court be enforced–*
>
> > *(a) when the act agreed to be done is in the performance, wholly or partly, of a trust;*
> >
> > *(b) when there exists no standard for ascertaining the actual damage caused by non-performance of the act agreed to be done;*
> >
> > *(c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or*
> >
> > *(d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.*
> >
> > *Explanation.– Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved.*
>
> ***22. Discretion as to decreeing specific performance****.– The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.*
>
> > *The following are cases in which the Court may properly exercise a discretion not to decree specific performance:-*
> >
> > > *I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there*

may be no fraud or misrepresentation on the plaintiff's part.

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

6. Section 24 ousts the grant of such relief in favour of a person in certain circumstances, and is reproduced below:

> ***24. Personal bars to the relief**.– Specific performance of a contract cannot be enforced in favour of a person-*
>
> *(a) who could not recover compensation for its breach;*
>
> *(b) who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed;*
>
> *(c) who has already chosen his remedy and obtained satisfaction for the alleged breach of contract; or*
>
> *(d) who, previously to the contract, had notice that a settlement of the subject-matter thereof (though not founded on any valuable consideration) had been made and was then in force.*

7. It is in view of section 24(b) of the Specific Relief Act that jurisprudence has developed requiring a person seeking specific performance of a contract to establish that he is not disentitled to seek relief for being delinquent in performance of his obligations under the contract he seeks to enforce. He is thus under an obligation to state in his pleadings and establish through his conduct that he has neither violated the terms of the contract in question nor is incapable of performing the same. In

a contract related to immovable property where he is under an obligation to pay consideration to the seller for such property, he is required to establish that he has paid the consideration or that he is ready, willing and able to pay such consideration. It has therefore been held that where part payment of consideration payable remains outstanding, the plaintiff ought to seek permission of the court to deposit such balance with the court to establish that the person does not suffer a legal disability in view of section 24(b) of the Specific Relief Act.

8. Let us reproduce the dicta laid down in our jurisdiction in relation to obligation of a person to establish his compliance with the terms of the contract that he seeks to enforce.

(I) In ***Haji Abdul Hameed Khan Vs. Ghulam Rabbani (2003 SCMR 953)*** it was held that, "in *a suit for specific performance, it is always of paramount consideration that the plaintiff, seeking equitable remedy of specific performance must be always willing and ready to perform his part of contract. Conduct of the petitioner unequivocally tends to reflect that he has been protracting the litigation on one or the other ground and has been successful so far on untenable grounds. Since the petitioner did not deposit the sale amount in compliance with the trial Court judgment as well as within the extended period, as permitted by the High Court, we would be legitimately justified in presuming that the petitioner is not serious in the prosecution of his remedy. He*

appears to be rather unwilling to perform his part of contract. This ground alone, in our view, is sufficient to disentitle him to a decree for specific performance."

(II) In ***Adil Tiwana Vs. Shaukat Ullah Khan Bangash (2015 SCMR 828)*** the plaintiff did not pay balance consideration. He deposited Defence Saving Certificate and Wapda Bonds and subsequently a bank guarantee, which expired, and no security was filed in court thereafter. The august Supreme Court declared it inequitable to order specific performance in favour of the plaintiff. It held that *"the remedy by way of specific performance is equitable and it is not obligatory on the court to grant such a relief merely because it is lawful to do so. Section 22 of the Specific Relief Act expressly stipulates so. It is axiomatic that one who seeks equity must do equity."*

(*III)* In ***Muhammad Wahid Vs. Nasrullah (2016 SCMR 179)*** it was held that where a decree passed with the direction to deposit the sale consideration within a certain period of time, failing which the suit would stand dismissed, the trial court would become functus officio after the lapse of the period specified with no jurisdiction to grant extension of time. Such request would only be made to the appellate court upon challenging the decree if there existed

justifiable grounds for seeking extension for payment of the sale consideration.

(*IV*) In ***Hamood Mehmood Vs. Mst. Shabana Ishaque*** **(2017 SCMR 2022)** the following was held:

It is mandatory for the person whether plaintiff or defendant who seeks enforcement of the agreement under the Specific Relief Act 1877, that on first appearance before the Court or on the date of institution of the suit, it shall apply to the Court getting permission to deposit the balance amount and any contumacious/ omission in this regard would entail in dismissal of the suit or decretal of the suit, if it is filed by the other side.

(V) *In* ***Mst. Waris Jan Vs. Liaqat Ali*** ***(PLD 2019 Lah. 333)*** it was held that the plaintiff, *"ought to have pleaded and proved not only his willingness, which was mental process, but also his readiness, which was something to do with translating that will into action and was preceded by necessary preparation for being in a position to be ready, that is, to be financially able to pay the purchase price. To adjudge whether the plaintiff was ready and willing to perform his part of the agreement (Ex.P-1), the conduct of the plaintiff prior and subsequent to the filing of the suit was relevant. It was for this reason it was mandatory for the plaintiff to prove that at the relevant time he had sufficient money to pay the*

remaining sale price; and, to apply to the Court, on his first appearance, for getting permission to deposit the balance amount."

(VI) In ***Kuwait National Real Estate Company (Pvt.) Ltd. Versus Educational Excellence Ltd*.** **(2020 SCMR 171)** it was held that, *"[i]t is now well settled that a party seeking specific performance of an agreement to sell is essentially required to deposit the sale consideration amount in Court. In fact, by making such deposit the plaintiff demonstrates its capability, readiness and willingness to perform its part of the contract, which is an essential pre-requisite to seek specific performance of a contract. Failure of a plaintiff to meet the said essential requirement disentitles him to the relief of specific performance, which undoubtedly is a discretionary relief."*

(VII) It was held in ***Muhammad Asif Awan Vs. Dawood Khan (2021 SCMR 1270)*** that, *"[a]dditionally, 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 has not been renounced by the vendor. Reference can be made to the case of Abdul Hamid v. Abbas Bhai Abdul Hussain (PLD 1959 (W.F.) Karachi 629).”

9. In **Muhammad Asif Awan** the august Supreme held that ***Hamood Mehmood Vs. Mst. Shabana Ishaque (2017 SCMR 2022)*** was a leave refusing order and did not lay down a binding principle of law in terms of Article 189 of the Constitution. In this case the learned trial court had granted a party certain time to deposit balance consideration due under the contract to be enforced. Upon the party's failure to do so, it extended the period fixed for such deposit. When the matter went to the High Court it dismissed the suit on the basis that the party seeking enforcement of the contract had disentitled itself to the relief claimed upon its failure to pay the balance consideration within the period first fixed by the learned trial court. The apex Court disagreed. It held that where the trial court had decreed a suit subject to the condition to pay the balance consideration within a certain period and the plaintiff failed to abide by such condition, upon expiry of the prescribed period the trial court would become functus officio and would be devoid of jurisdiction to grant any extension for payment of such consideration. (In such situation only an appellate court could grant extension in the period for making payment, if there existed justifiable grounds in favour of the appellants, as held by the august Supreme Court in ***Muhammad Wahid Vs. Nasrullah (2016 SCMR 179)***). Likewise, a trial court could order payment of balance consideration and prescribe penal consequences in the event of the plaintiff's failure to comply, including dismissal of the suit, and in such case the suit could be dismissed upon breach of the condition imposed by the trial court. However, where the trial court did not specify any penal consequences for non-compliance

with the payment order, the plaintiff would not stand non-suited automatically upon expiry of the period provided for payment of balance consideration, and the trial court retained the authority and discretion to grant extension in the period prescribed for deposit of balance consideration.

10. The question of whether time was the essence of the contract in relation to sale of immovable property and the consequences of failure of a party to perform its obligation under the contract in terms of making balance consideration came before the august Supreme Court in ***Mst. Samina Riffat Vs. Rohail Asghar (2021 SCMR 7)*** and the Apex Court held that in such circumstances a provision relating to forfeiture of earnest amount was to be given effect in the following terms:

> *13. …Generally, in respect of sale of immovable property, time is not considered as of the essence of the contract. However, parties may consciously strike a deal to make time essence of the contract by providing certain consequences for breach of reciprocal obligation casted upon them, in such cases, time is treated as essence of the contract.*

While approving and citing the judgment of the learned Sindh High Court in ***Abdul Hamid Vs. Abbasi Bhai-Abdul Hussain (PLD 1959 (W.P.) Karachi 629)*** the Apex Court held that:

> *In cases arising out of sale of immovable property, a vendee seeking specific performance has to demonstrate his readiness and willingness to perform his part of reciprocal obligation as to payment of balance sale consideration. The question what is readiness and willingness to perform a contract was attended to by a learned division bench of the West Pakistan High Court (Karachi) in the case of Abdul Hamid v. Abbas Bhai-Abdul Hussain. It was held that "In the first place, willingness to perform ones contract in respect of*

purchase of property implies the capacity to pay the requisite sale consideration within the reasonable time. In the second place, even if he has the capacity to pay the sale consideration, the question still remains whether he has the intention to purchase the property. On consideration of all the facts it appears that the appellant was not in a position to pay the balance sale consideration. At any rate, the appellant was not willing, even if he had the capacity to pay the money, to have the sale deed completed."

11. In view of the aforementioned precedents, the following conclusions can be drawn from the jurisprudence in relation to specific performance of contract related to immovable property:

1. A claim for specific performance of a contract seeks grant of discretionary relief in terms of section 12 and 22 of the Specific Relief Act, which is to be granted only in the interest of fairness and to dispense justice in accordance with law. One who seeks equity must do equity and thus the conduct of the claimant before and after the filing of the suit should be such that it does not disentitle him from being the recipient of equitable relief.

2. Specific performance cannot be granted in favour of a person, "who has become incapable of performing" his obligation under the contract, or "violates any essential term of the contract that on his part remains to be performed", in terms of section 24(b) of the Specific Relief Act. It is therefore essential for a plaintiff to state unequivocally in the plaint that he is in compliance of his obligation under the contract

he seeks to enforce, and to the extent that an obligation remains outstanding, such as payment of balance consideration, he is ready, willing and able to discharge the same. The failure of a plaintiff to ensure that such representation is included in the plaint could invite consequences under Order VII Rule 11(d) of the Civil Procedure Code, with the trial court finding that the suit is barred in view of section 24(b) of the Specific Relief Act, if the plaint does not manifest that the plaintiff is not in breach of any essential term of the contract to be performed.

3. Notwithstanding the statement in the plaint regarding compliance with the provisions of the contract, where the plaintiff is seeking enforcement of a contract in relation to immovable property, and any consideration in lieu of such property remains outstanding, even if due to steps that remains to be taken on part of the counter party in such contract, it is for the plaintiff to seek permission to deposit balance consideration or valid financial security in lieu thereof to establish within the meaning of section 24(b) that plaintiff is not incapable of performing his/her end of the bargain as held by the august Supreme Court in ***Kuwait National Real Estate Company (Pvt.) Ltd. Versus Educational Excellence Ltd. (2020 SCMR 171)***.

4. Non-deposit of balance consideration after seeking court permission would not result in automatically dismissal of the suit as held by the august Supreme Court in ***Muhammad Asif Awan Versus Dawood Khan (2021 SCMR 1270)***. But the Specific Relief Act vests discretion in the trial court to determine whether or not a party is entitled to discretionary relief. The failure of the plaintiff to seek to deposit balance consideration with the court upon filing the suit would create a rebuttable presumption against the plaintiff regarding his/her capability and willingness to perform the contract at such time.

5. In the event that a plaintiff fails to seek permission to deposit balance consideration at the time of filing the suit, a structured and judicious exercise of discretion by the trial court, in terms of section 22 of the Specific Relief Act requires that the trial court order the plaintiff to deposit balance consideration or financial security in lieu thereof, to determine that grant of relief of specific performance is not barred under section 24(b) of the Specific Relief Act, due to the incapability of the plaintiff to discharge his/her obligation under the contract specific performance of which is sought.

6. Where the trial court orders the plaintiff to deposit balance consideration within a fixed period to satisfy itself that the plaintiff is not barred from being

granted the relief sought under section 24(b) of the Specific Relief Act, and the plaintiff fails to comply within the time fixed without justifiable cause to the satisfaction of the trial court, the court is vested with authority under Order XV-A to pass judgment or proceed to decide the suit forthwith under Order XVII Rule 3 of the CPC read with section 24(b) of the Specific Relief Act, without the need to issue any additional warning to the plaintiff (in view of the law laid down by the august Supreme Court in *Syed Tahir Hussain Mehmoodi Versus Agha Syed Liaqat Ali (2014 SCMR 637)* in relation to Order XVII Rule 3). If, however, the trial court is satisfied that the disqualification under section 24(b) of the Specific Relief Act is not attracted or the plaintiff ought to be granted further time to demonstrate his/her ability and intent to perform the contract in the facts and circumstances of the case it is not under a legal obligation to dismiss or decide the suit forthwith. The discretion in view of section 12 and 22 of the Specific Relief Act is vested in the trial court and the principles laid down by the august Supreme Court are for purposes of guidance in relation to exercise of such discretion by the trial court.

7. In an appropriate case, the trial court would be within its jurisdiction to dismiss a plaint seeking specific performance of a contract if it appears from

the statement in the plaint that it is barred by law in view of section 24(b) of the Specific Relief Act, hence the need to state in the pleadings relevant facts regarding discharge of the plaintiff's obligation under the contract the performance of which is sought. Likewise, the trial court may decide the suit in terms of Order XV-A or Order XVII Rule 3 of the CPC, in the event that it orders the plaintiff to deposit balance sale consideration payable under the contract and the plaintiff fails to comply with such order within the time period as initially fixed or subsequently extended by the trial court.

8. The question of extension of time period for deposit of balance consideration does not however apply once the trial court has issued a decree coupled with a condition requiring deposit of balance consideration within a certain prescribed period and has held that failing compliance with such condition the suit would stand dismissed. In such case (which would only arise where the trial court in its discretion does not require deposit of balance consideration at the initiation of the trial) the trial court becomes functus officio after the lapse of time fixed and is no longer vested with jurisdiction in relation to the lis.

9. Where the contract prescribes penal consequences for failure of a contracting party to discharge his/her obligation within a period prescribed, it would be

> deemed that it was within the contemplation of the parties in relation to sale of immovable property that time was of the essence for performance of the obligation under the contract and penal consequences such as forfeiture of any earnest money paid by the defaulting party would be given effect by the court if clearly provided in the contract the performance of which is being sought.

12. In view of the law as explained above, we find that the impugned judgment and decree suffer from no infirmity. The learned Civil Court was under an obligation to satisfy itself that the suit filed by the appellants was not barred under section 24(b) of the Specific Relief Act and it consequently issued the direction to the appellants to deposit the balance sale consideration with the court as necessary condition to establish the appellants' ability and the intent to discharge his obligation under the agreement to sell, the performance of which was being sought by the appellants. The appellants failed to abide by the court's direction, which established that he was not only in breach of his own obligations under the agreement but also exhibited his inability and lack of intent to discharge his obligations under the agreement. In view of such circumstances the learned Civil Court correctly decided the case forthwith under provisions of Order XVII Rule 3 of CPC by dismissing the suit of the appellants. The learned counsel for the appellants has failed to convince us that the impugned judgment and decree suffer from any infirmity. The appeal is therefore **dismissed** with a

cost of Rs.25,000/- payable by the appellants to the respondents within a period of 30 days. Learned counsel for the appellants will file a compliance certificate with Deputy Registrar (Judicial) of this Court certifying that the order as to cost has been complied with.

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

(BABAR SATTAR)
JUDGE

Announced in open Court on 27.04.2022.

JUDGE JUDGE

Approved for reporting.

Saeed.