JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A. No.98 of 2006
Israr Ahmed Afzal
Versus
Mehtabuddin (deceased) and others

Date of Hearing:	20.01.2022
Appellant by:	Mr. Tahir Mahmood Abbasi, Advocate
Respondents by:	Saad M. Hashmi, Advocate for respondent No.1 (1a to 1f) Ms. Mehraj Tareen, Advocate for C.D.A.

MIANGUL HASSAN AURANGZEB, J:- Through the instant regular first appeal the appellant, Israr Ahmed Afzal, assails order and decree dated 14.10.2006 passed by the Court of the learned Civil Judge, Islamabad, decreeing the suit for specific performance of the agreement to sell dated 21.03.2006 executed between the appellant and Mehtabuddin (the deceased predecessor of respondents No.1a to 1f).

Factual Background:-

2. The record shows that on 21.03.2006, Mehtabuddin and the appellant entered into an agreement to sell, whereby the former agreed to sell to the latter ground plus three-storey building along with all leasehold rights of Plot No.4-A, measuring 866.6 square yards situated at F-7 Markaz, Islamabad (**"the suit plot"**) for a total sale consideration of Rs.540 million, out of which Rs.10 million was paid as earnest money in the form of (i) pay order No.1037207, dated 21.03.2006 for an amount of Rs.8,378,167/- drawn on Standard Chartered Bank in favour of the Capital Development Authority (**"C.D.A."**) against its demand for the commercialization of the said plot, and (ii) Rs.1,621,833/- in cash. Additionally, an amount of Rs.140 million was paid by the appellant through cheque No.0197609 drawn on Standard Chartered Bank which was to be realized on the date of the receipt of the letter of commercialization of the said plot from the C.D.A. The remaining sale consideration of Rs.390 million was agreed to be paid within two months of the date

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of the agreement to sell with a grace period of one month. It was agreed by the parties to the said agreement that time was to be of the essence for the performance of the obligations under the agreement.

3. Vide letter dated 27.03.2006, the Estate Management Directorate of the C.D.A. acceded to Mehtabuddin's request for the conversion of the status of the suit plot from clinic to commercial. The receipt of payment of Rs.8,378,167/- on account of the commercialization fee was acknowledged by the C.D.A.

4. It is an admitted position that a total amount of Rs.150 million had been paid by the appellant to Mehtabuddin.

5. Vide legal notice dated 09.06.2006, the appellant requested Mehtabuddin to deliver vacant possession of the suit plot and receive the balance sale consideration within ten days. Vide reply to the legal notice dated 13.06.2006, Mehtabuddin requested the appellant to arrange the balance sale consideration of Rs.390 million failing which the earnest money amounting to Rs.150 million would be forfeited. Vide legal notice dated 12.07.2006, Mehtabuddin called upon the appellant to pay the balance sale consideration on or before 15.07.2006 and get the suit plot transferred in his name before the C.D.A. The appellant was warned that in case of failure to pay the balance sale consideration, the amount already paid by the appellant shall be forfeited. The appellant, in his reply to the legal notice dated 12.07.2006, took the position that Mehtabuddin had failed to pay the commercialization charges with respect to the suit plot and obtain no demand certificates from the Revenue Directorate of the C.D.A. as well as to have the premises vacated except one shop. The appellant also expressed that he was ready to pay the remaining sale consideration. Vide legal notice dated 19.07.2006, Mehtabuddin once again called upon the appellant to arrange the balance sale consideration of Rs.390 million and to provide a copy of a pay order for the said amount within a period of seven days failing which the earnest money amounting to Rs.150 million would be forfeited and the suit plot would be sold to another party. Finally,

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vide legal notice dated 26.07.2006, Mehtabuddin informed the appellant that the earnest money amounting to Rs.150 million had been forfeited and that the former was free to sell the suit property to another person. Mehtabuddin had also published notices in newspapers to the effect that the appellant had failed to pay the remaining balance sale consideration and therefore the earnest money had been forfeited and the agreement to sell dated 21.03.2006 was cancelled.

6. It was in these circumstances that the appellant, on 16.08.2006, filed the suit for specific performance of the agreement to sell dated 21.03.2006 before the Court of the learned Civil Judge, Islamabad. In the said suit, it was pleaded *inter alia* that the appellant was ready and willing to pay the remaining sale consideration of Rs.390 million.

7. On 11.09.2006, Mehtabuddin filed a written statement conceding to the appellant's claim for the transfer of the suit plot provided that the balance sale consideration is paid within one day failing which it was prayed that the suit be dismissed. On 15.09.2006 (i.e., four days after the filing of the written statement), the learned Civil Court recorded Mehtabuddin's statement to the effect that if the appellant prepares a pay order for the remaining sale consideration within one day, he would transfer the suit plot to the appellant within one day and receive the pay order for the balance sale consideration from the Court. On the said date, the Court also recorded the contention of the learned counsel for the appellant to the effect that except for the time period mentioned by Mehtabuddin, the offer made by him was acceptable to the appellant. Furthermore, it was contended that any order in this regard be passed after appearance on behalf of the C.D.A. before the Court so that the genuineness of Mehtabuddin's title is ascertained.

8. The C.D.A., in its written statement, had taken the position that Mehtabuddin was the lessee of the suit plot vide C.D.A.'s letter dated 24.07.1979; that the suit plot had been allotted for the construction of a three-storey building for a clinic but on the

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request of the lessee, the status of the suit plot was converted for commercial use vide C.D.A.'s letter dated 27.03.2006; that the building on the suit plot had been completed on 08.08.2005 and a completion certificate had been issued by the C.D.A. on 03.07.2006; and that a no demand certificate had also been issued by the C.D.A. on 04.07.2006.

9. On 22.09.2006, the representative of the C.D.A. tendered appearance before the learned Civil Court and stated on oath that the suit plot was transferable after payment of outstanding dues and observance with codal formalities. Furthermore, it was stated that the C.D.A. does not object to the transfer of the suit plot and in this regard, a no demand certificate had been issued by the C.D.A.

APPLICATION UNDER ORDER XV, RULES 1 AND 2 READ WITH ORDER XII, RULE 6 C.P.C. FILED BY MEHTABUDDIN:-

10. On 22.09.2006, the learned Civil Court took up for hearing Mehtabuddin's application under Order XV, Rules 1 and 2 read with Order XII, Rule 6 C.P.C. praying for the appellant's suit to be decreed. In the said application, it was pleaded *inter alia* that Mehtabuddin being the seller of the suit plot conceded to the appellant's suit subject to the payment of the remaining sale consideration amounting to Rs.390 million. The C.D.A. filed a reply to the said application wherein it was pleaded that it had no objection to the transfer of the suit plot subject to the observance of the codal formalities. With regard to Mehtabuddin's said application the learned counsel for the appellant recorded the statement before the learned Civil Court to the effect that Mehtabuddin's application be accepted and the suit be decreed in the appellant's favour. However, reasonable time was sought for the payment of the remaining sale consideration since the documents required for the transfer of the suit plot had not been obtained by Mehtabuddin within the period fixed in the agreement.

11. On the basis of the statements of the learned counsel for the appellant and the representative of the C.D.A., the learned Civil Court, vide order dated 22.09.2006, allowed Mehtabuddin's application under Order XV, Rules 1 and 2 read with Order XII, Rule

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6 C.P.C. subject to the submission of proof as to Mehtabuddin's title to the suit plot. The representative of the C.D.A. was directed to appear in-person on 26.09.2006 to verify Mehtabuddin's title to the suit plot.

APPLICATION FOR RETURN OF EARNEST MONEY FILED BY THE APPELLANT:-

12. On 26.09.2006, the appellant filed an application under Section 151 C.P.C. praying for the issuance of an order that in case the appellant does not pay the remaining sale consideration, the suit shall stand automatically dismissed and Mehtabuddin shall be bound to return the earnest money to the appellant. In the said application, it was pleaded that the agreement to sell did not contain a provision for the forfeiture of the earnest money in case the appellant did not pay the remaining sale consideration.

13. The said application was contested by Mehtabuddin. In the reply to the said application, it was prayed that the appellant's suit be decreed subject to the payment of the remaining sale consideration amounting to Rs.390 million failing which the suit be dismissed with special costs.

14. Vide order dated 28.09.2006, the learned Civil Court dismissed the appellant's said application under Section 151 C.P.C. The operative part of the said order is reproduced herein below:-

> *"The perusal of file shows that plaintiff/petitioner has filed suit for Specific Performance of agreement to sell dated 21-3-2006 and defendant No.1 has filed consenting written statement praying that suit be decreed conditionally subject to payment of remaining sale consideration."*

APPLICATION FOR AMENDMENT OF PLAINT FILED BY THE APPELLANT:-

15. On 28.09.2006, the appellant filed an application under Order VI, Rule 17 C.P.C. praying for an amendment in the plaint. Through the said application, the appellant sought to include an alternative prayer in the suit that Mehtabuddin be directed to return the earnest money which he received from the appellant along with interests at the scheduled bank rate. In the said application, it was pleaded *inter alia* that Mehtabuddin had failed to perform his

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obligations under the agreement to sell inasmuch as the C.D.A. had issued documents required for the transfer of the suit plot on 04.07.2006 which is beyond the date fixed in the agreement for the performance of the transaction.

16. Mehtabuddin submitted a reply to the said application under Order VI, Rule 17 C.P.C. conceding to the said application. Accordingly, vide order dated 28.09.2006, the learned Civil Court allowed the said application and required the appellant to file the amended plaint on 02.10.2006. On 06.10.2006, the appellant filed the amended plaint to which Mehtabuddin filed an amended written statement. In the amended written statement, Mehtabuddin stood by his earlier position that the appellant be directed to deposit in the Court the remaining sale consideration of Rs.390 million in the form of a pay order and thereafter, the suit plot shall be transferred to the appellant in the records of the C.D.A. It was also prayed that in the event of failure on the appellant's part to deposit the remaining sale consideration, the suit be dismissed with costs.

APPELLANT'S APPLICATION UNDER ORDER XIV, RULE 1 C.P.C.:-

17. On 09.10.2006, the appellant filed an application under Order XIV, Rule 1 C.P.C. for the framing of an issue on the question as to which party failed to perform his obligations under the agreement to sell. The appellant wanted the said issue to be framed and the parties be given a chance to lead evidence so as to enable the Court to decide the controversy regarding the forfeiture of the earnest money.

18. The said application was contested by Mehtabuddin by filing a written reply. In the said reply, it was pleaded *inter alia* that the question of the alternative relief regarding the return of the earnest money could only be raised if the appellant foregoes his claim of specific performance of the agreement to sell.

19. Vide order dated 14.10.2006, the learned Civil Court dismissed the appellant's application under Order XIV, Rule 1 C.P.C. Furthermore, the learned Civil Court decreed the appellant's suit for specific performance subject to the payment of the

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remaining sale consideration of Rs.390 million within one month, failing which the suit was to be deemed to have been dismissed.

20. The said order and decree dated 14.10.2006 has been assailed by the appellant in the instant appeal.

21. Vide interim order dated 23.11.2006, the operation of the impugned order and decree was suspended by the appellate Court. On 09.02.2016, the appeal was dismissed for non-prosecution. Vide order dated 24.02.2020, the appeal was restored to its original number. During the pendency of the appeal, Mehtabuddin passed away and his legal heirs were impleaded as respondents.

22. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that Mehtabuddin had received a hefty amount of Rs.10 million as earnest money and Rs.140 million as part-payment; that possession of the suit plot was never handed over to the appellant; that Mehtabuddin was under an obligation to change the status of the suit plot from 'clinic to commercial' and pay all the commercialization charges to the C.D.A.; that Mehtabuddin had obtained a no-demand certificate from the C.D.A. after the dated fixed in the agreement to sell for the transfer of the suit plot; and that Mehtabuddin was also under an obligation to hand over vacant possession of all the units in the suit plot except the one occupied by 'One Potato Two Potato'. It was prayed that the relief of specific performance be granted to the appellant. Learned counsel for the appellant also submitted written arguments.

23. On the other hand, learned counsel for the legal heirs of Mehtabuddin submitted that despite the order and decree dated 14.10.2006 having been passed more than fifteen years ago, the appellant never applied to the Court for the deposit of the remaining sale consideration; that the appellant cannot expect to be declared as the owner of the suit plot by paying in 2022 the remaining sale consideration agreed in the year 2006; that although the terms of the agreement to sell entitled Mehtabuddin to forfeit the earnest money and advance payment on the appellant's failure to pay the remaining sale consideration of Rs.390 million,

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the legal heirs of Mehtabuddin are willing to return Rs.140 million to the appellant; that since the appellant's conduct has been most inequitable, he is not entitled to the relief of specific performance; that it is well settled that he who seeks equity must do equity; that the mere fact that the appellant did not deposit the remaining sale consideration of Rs.390 million within one month of the passing of the impugned order and decree shows that the appellant at that time did not have the remaining sale consideration for the fulfillment of his obligations under the agreement to sell; that the inability of the appellant to pay the remaining sale consideration within a period of one month of the impugned order and decree, negatives his stance that he was ready and willing to perform his obligations under the agreement to sell; and that the impugned order and decree does not suffer from any legal infirmity. Learned counsel prayed for the appeal to be dismissed.

24. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 22 above, and need not be recapitulated.

25. As mentioned above, the appellant's suit for the specific performance of the agreement to sell dated 21.03.2006 was decreed vide the impugned order and decree dated 14.10.2006 subject to the deposit of the remaining sale consideration amounting to Rs.390 million within a period of one month. It was specified in the said order and decree that if the said amount was not paid within month, the suit *"shall be deemed to have been dismissed."* It is an admitted position that at no material stage after the order and decree dated 14.10.2006 was passed by the learned Civil Court, did the appellant pay the remaining sale consideration to Mehtabuddin or his legal heirs.

26. The High Court, vide interim order dated 23.11.2006, suspended the operation of the said order and decree. The fact that Mehtabuddin wanted the appeal to be decided early is evidenced by his application for early hearing. Due to the

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appellant's absence from the Court on 09.02.2016, this appeal was dismissed for non-prosecution. It was not until 24.02.2020 that it was restored to its original number.

27. Under the terms of the agreement to sell dated 21.03.2006, earnest money amounting to Rs.10 million (i.e., Rs.8,378,167/- in the form of pay order No.1037207, dated 21.03.2006 drawn on Standard Chartered Bank and Rs.1,621,833/- in cash) had been paid to Mehtabuddin. Additionally, an amount of Rs.140 million was paid by the appellant to Mehtabuddin through cheque No.1097609 drawn on Standard Chartered Bank. This amount was to be realized by Mehtabuddin on receiving the final letter of commercialization from the C.D.A. with respect to the suit plot.

28. Vide letter dated 27.03.2006, the Estate Management Directorate of the C.D.A. informed Mehtabuddin that his request for the conversion of the status of the suit plot to commercial had been acceded to. He was permitted to continue commercial activities at the suit plot. The receipt of Rs.8,378,167/- as commercialization fee was acknowledged by the C.D.A.

29. As per the terms of the said agreement to sell, the remaining sale consideration amounting to Rs.390 million had to be paid within two months with a grace period of one month i.e., up to 21.06.2006. There were several legal notices exchanged between the appellant and Mehtabuddin. The appellant and Mehtabuddin blamed each other for the non-fulfillment of the obligations under the said agreement to sell. In essence, the appellant expressed his ability and readiness to pay the remaining sale consideration whereas Mehtabuddin's stance was that he was in a position to transfer the suit plot to the appellant on receipt of the remaining sale consideration and that the no objection certificates as well as no demand certificates had been obtained from the C.D.A. Be that as it may, the fact remains that the remaining sale consideration of Rs.390 million has not been paid at any stage by the appellant and therefore, the title in the suit plot still vests in Mehtabuddin and/or his legal heirs.

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30. On 16.08.2006, the appellant instituted the suit for specific performance of the said agreement to sell. In his written statement, Mehtabuddin pleaded *inter alia* that he concedes to the appellant's claim and that if the balance sale consideration is deposited in the Court within one day, he would transfer the suit plot to the appellant in the C.D.A. records. On 22.09.2006, Mehtabuddin also filed an application praying for the appellant's suit to be decreed and a judgment pronounced in terms of Order XV, Rules 1 and 2 C.P.C. The appellant did not avail this opportunity. Instead he filed an application under Section 151 C.P.C. on 26.09.2006 praying for the issuance of an order that in case the appellant does not pay the remaining sale consideration, the suit shall stand automatically dismissed and Mehtabuddin shall be bound to return the earnest money to the appellant. After the learned Civil Court dismissed the said application, vide order dated 28.09.2006, the appellant filed an application for an amendment in the plaint. The appellant wanted to include in the prayer clause of his suit for specific performance an alternative prayer for the return of the earnest money. This application was conceded to by Mehtabuddin. Thereafter, an amended plaint and an amended written statement was filed. On 09.10.2006, the appellant filed an application under Order XIV, Rule 1 C.P.C. for the framing of an issue for determining which party to the agreement to sell had failed to perform its obligations under the agreement to sell. In the said application, it was also pleaded that after the framing of an issue, evidence be recorded. The appellant's said conduct demonstrated that he wanted linger on the proceedings in the suit and keep the suit plot under litigation. However, vide impugned order and decree dated 14.10.2006, the said application was dismissed and the suit for specific performance filed by the appellant was decreed subject to the conditions mentioned above.

31. The appellant's conduct prior to and after the institution of the suit was such as would disentitle him to the equitable relief of specific performance. In the face of several requests by Mehtabuddin that the balance sale consideration be paid in the

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Court so that the suit property could be transferred to the appellant, the latter tried to delay the matter by filing miscellaneous applications. Had the appellant accepted Mehtabuddin's offer made in the replies to the appellant's legal notices, written statement to the suit and replies to the appellant's applications, the suit plot would have been transferred to the appellant fifteen years ago on payment of the remaining sale consideration.

32. The appellant's demand that the C.D.A. verifies Mehtabuddin's ownership of the suit plot was also an effort to protract the proceedings before the learned Civil Court. As mentioned in paragraph 9 above, the representative of the C.D.A. tendered appearance before the learned Civil Court on 22.09.2006, and stated on oath that the suit plot was transferable and that the C.D.A. does not object to the transfer of the suit plot and in this regard, a no demand certificate had been issued by the C.D.A. The C.D.A., in its written statement, had taken the position that Mehtabuddin was the lessee of the suit plot vide C.D.A.'s letter dated 24.07.1979 and that on the request of the lessee, the status of the suit plot was converted for commercial use vide C.D.A.'s letter dated 27.03.2006. It was also pleaded that a no demand certificate had also been issued by the C.D.A. on 04.07.2006. Despite all this, the appellant did not opt to pay the remaining sale consideration so that suit plot could be transferred in his favour.

33. Since the learned counsel for the appellant was not clear in his position as to whether the appellant wanted the return of the earnest money and advance payment already paid to Mehtabuddin in the year 2006 or whether he wanted the said agreement to sell to be enforced, this Court on 02.11.2021, passed the following order:-

> ***"Since the [appellant] has been wavering in his stance as to the relief that he seeks from this Court, we deem it appropriate to require the appellant to take a specific position in writing as to the relief he is seeking from this Court."***

34. Written submissions were filed on behalf of the appellant, paragraph 7 whereof is reproduced herein below:-

> ***"Now the Appellant submits that in compliance of order dated 02.11.2021 that relief be granted as per the prayer made in the plaint preferably principle relief for specific performance of***

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agreement to sell regarding suit property bearing No. 4A, situated in F-7 Markaz Islamabad."

35. At no material stage between the filing of the suit and the passing of the impugned order and decree did the appellant abandon his claim for the specific performance of the agreement to sell dated 21.03.2006. The learned Civil Court, by decreeing the appellant's suit for specific performance, gave an opportunity to the appellant to pay the remaining sale consideration within one month of 14.10.2006 failing which the suit was to be considered as dismissed. The appellant now wants to get title of the suit property by paying the remainder of the sale price which was agreed in the year 2006. The appellant by his own inequitable conduct has disentitled himself from this relief. Even when the instant appeal was filed, there is nothing on the record to show that the appellant deposited the remaining sale consideration of Rs.390 million. Remedy of specific performance is an equitable remedy. Readiness and willingness on the part of the plaintiff to perform his part of the contract has to be ascertained from the totality of circumstances. Therefore, bearing in mind the circumstances of the case, we are of the view that the learned Civil Court did not commit any illegality by decreeing the appellant's suit on the basis of the concession made by Mehtabuddin, and granting the appellant a period of one month to pay the remaining sale consideration. Since the appellant did not pay the remaining sale consideration within one month, the suit stood dismissed and the appellant has only himself to thank for the unsavory consequences he finds himself in.

36. As mentioned above, earnest money amounting to Rs.10 million was paid by the appellant to Mehtabuddin on 21.03.2006. An additional payment of Rs.140 million was made when the letter of commercialization with respect to the suit plot was issued by the C.D.A. In this way, Mehtabuddin received a total payment of Rs.150 million from the appellant. The agreement to sell dated 21.03.2006 provides that if the appellant backs out from the deal or fails to pay the remaining sale consideration within the prescribed period, the deal would be considered as cancel and the received earnest

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money will be forfeited. Since the appellant did not pay the remaining sale consideration

37. Now, the agreement to sell dated 21.03.2006 made Mehtabuddin responsible to *inter alia* obtain no objection certificate and no demand certificate from the concerned Directorate of the C.D.A. This obligation was placed on Mehtabuddin since without such certificates, the C.D.A. does not transfer title in property. The record shows that the no demand certificate had been issued by the C.D.A. on 04.07.2006. This certificate was obtained after 21.06.2006 which was the date fixed in the agreement to sell for the transfer of the suit plot. The mere fact that the no demand certificate was issued by the C.D.A. on 04.07.2006 which is after the date agreed by the parties for the performance of the agreement, the suit plot could not have been transferred to the appellant prior to the issuance of a no demand certificate.

38. The fact that Mehtabuddin was unable to obtain the no demand certificate from the C.D.A. by the date agreed between the parties for the performance of the agreement gave a right to the appellant to rescind the agreement and seek the return of the earnest money and advance payment or to seek the specific performance of the agreement on the terms already settled. The appellant opted not to rescind the agreement and seek the return of the earnest money and advance payment from the appellant. He sought the specific performance of the agreement by filing a suit. However, after the no demand certificate was obtained, the appellant did not accept the offer made by Mehtabuddin for the transfer of the suit plot after the remaining sale consideration was paid. Even after the institution of the suit, the appellant's conduct demonstrated his reluctance to pay the remaining sale consideration. Therefore we hold that the forfeiture of the earnest money by Mehtabuddin was justified.

39. As regards the advance payment of Rs.140 million, learned counsel for the legal heirs of Mehtabuddin was fair in his submission that the said payment of Rs.140 million would be

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returned to the appellant within six months. The possession of the suit plot has remained with Mehtabuddin and/or his legal heirs at all material stages, and they have been deriving benefits therefrom.

40. Since we find that Mehtabuddin was justified in forfeiting the earnest money amounting to Rs.10 million and since the learned counsel for the legal heirs of Mehtabuddin has very fairly submitted that his clients are willing to return the advance payment of Rs.140 million, we deem it appropriate to direct the respondents to return Rs.140 million to the appellant with simple interest within a period of six months from today.

41. The appeal stands dismissed in the above terms. There shall be no order as to costs.

(ARBAB MUHAMMAD TAHIR)
JUDGE

(MIANGUL HASSAN URANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 19/04/2022

(JUDGE)

(CHIEF JUSTICE)

Ahtesham*

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