

Regular First Appeal No.97 of 1996

Mst. MUNAWAR SHAHZADI VERSUS MUHAMMAD GHAFOR

07.06.2010 Mr. Taffazal H. Rizvi Advocate for Appellant.
Mr. Amir Rehman Advocate for Respondent.

This R.F.A. is directed against the judgment and decree dated 6-2-1996, passed by the learned Civil Judge 1st Class, Lahore whereby the suit instituted by the respondent for possession through specific performance of an agreement dated 3-7-1989 was decreed in favour of the respondent.

2. Briefly stating the facts of the case are that the appellants are the owners of Bungalow/Property No.S-XVI-27-S-33 situated in Justice Sharif Scheme, Lahore and entered into an agreement to sell dated 8-7-1989 of the said Bungalow in favour of the respondent for a sum of Rs.21,60,000/-. A sum of Rs.500,000/-was received by the appellants as part payment/earnest money out of the sale price. The remaining amount of Rs.16,60,000/-was to be paid by the respondent within a period of three months from 3-7-1989 incorrectly mentioned as 8-7-1989 in suit instituted by the respondent. That clause 3 of the agreement postulated that the time for effecting registered sale-deed in favour of respondent is fixed as three months from 3-7-1989 to 3-10-1989. During this period appellants-owners were to arrange for the copies of mutation entries and the clearance of the

other utility bills in respect of the subject property. It was further stated in the agreement in its clause 5 that during the time already specified above the respondent/vendee was to seek the completion of the sale-deed in his favour. It was further agreed between the parties that if the respondent/vendee does not make the payment within the period specified above the earnest money paid shall stand forfeited. It was also agreed in clause 9 that if during the period specified above the appellants do not complete the effecting of registered sale-deed or adopts dilatory tactics then the appellants shall pay the double amount of the earnest money received by them to the respondent and that the respondent shall have a right to seek the completion of the registered sale-deed in his favour through the process of the court.

3. It is the case of the respondent that he has been insisting upon the appellants to complete the registration of the sale in his favour within the specified time and on their failure, ultimately they instituted suit on 6-5-1992 against the appellants. This suit was contested by the appellants by submitting written-statement in which a plea has been taken by the appellants that the respondent failed to make payment of remaining consideration amount to the appellants within the stipulated time and in fact had shown his inability due to some financial problems and that time was the essence of the contract thus in view of the above circumstances the agreement to sell stood already cancelled by mutual consent.

The respondent also claimed an extension in the agreement to sell through a writing endorsed on the reverse side of the agreement to sell which was denied by the appellants as it does not reflect the signatures of any of the parties nor of the witnesses thereon.

4. Out of the pleadings of the parties the learned Civil Judge framed the following issues:---

ISSUES.

- (1) *Whether the plaintiff is entitled to a decree for possession through specific performance of suit property as mentioned in the plaint? OPP.*
- (2) *Whether the suit is not maintainable in its present form? OPD.*
- (3) *Whether the suit has been filed with mala fide intention just to harass and blackmail the defendants? OPD.*
- (4) *Whether the plaintiff has no cause of action and locus standi to file the present suit? OPD*
- (5) *Whether the word and conduct of the plaintiff is barred to file the present suit? OPD.*
- (5-A) *Whether plaintiff is entitled to recover special compensation of Rs.thirty lacs from defendant as prayed for in para No.4-A of amended plaint? OPP.*
- (6) *Relief.*

5. The parties produced their respective evidence and the learned Civil Judge decreed the suit in favour of the respondent against the appellants on 6-2-1996. An appeal against the judgment and decree dated 6-2-1996 was preferred by the respondents before the learned District Judge, Lahore on account of pecuniary jurisdiction involved in the matter. The appeal preferred by the appellants was accepted and the judgment and decree dated 6-2-1996 was set

aside by the learned Additional District Judge, Lahore. An R.S.A. No.179 of 2004 was preferred against the said judgment and decree of the learned Additional District Judge which R.S.A. was dismissed vide judgment and decree dated 11-10-2006. C.P.L.A. No.2443-L of 2006 was preferred by the respondent before the honourable Supreme Court of Pakistan which was accepted vide order dated 11-3-2010 and the matter was remanded back by the honourable Supreme Court of Pakistan to this Court for hearing and disposal of the R.F.A. No.97 of 1996 expeditiously which appeal was deemed to be pending after the passing of the order dated 11-3-2010 passed by the honourable Supreme Court of Pakistan.

6. It is contended by the learned counsel for the appellants that agreement to sell dated 3-7-1989 Exh.P.1 stipulated period of three months for completion of the agreement to sell and that by specifying above period the intention of the parties was to treat the time as the essence of the contract and the respondent has failed to get the sale-deed executed in his favour by tendering or paying the balance of sale price to the appellants within the specified time and therefore he was not entitled to the decree of specific performance of the agreement Exh.P.1. The learned counsel then argued that relief of specific performance of the agreement was a discretionary relief and in view of the circumstances of the case the respondent was not entitled to the exercise of discretion in his favour. Reliance was placed upon Abdul

Aziz and another v. Abdul Rehman and others (1994 SCMR 111), Muhammad Sharif v. Mst. Faji and others (1996 CLC 883), Malik Ellahi Bux and others v. Muhammad Aslam 2002 CLC 433, City Education Board (Registered) Sialkot through Director v. Mst. Maqbool Nasreen (PLD 2008 Lhr. 51), Muhammad Rangoonwala v. Mst. Razia Fatima A. Karim through her attorney (2007 MLD 1949) and Moharaj Bahadur Singh v. Suresh Chandra Roy (AIR 1921 Calcuta 179) in support of his contentions.

7. The learned counsel for the respondent has controverted the arguments of the learned counsel of the appellants and has argued that in the matters of agreement to sell with respect to immovable property time is never considered the essence of the contract and the respondent/ vendee has been allowed a period of three years by the law to seek enforcement of the agreement to sell. It was further argued that the respondent however acted in full responsibility with respect to the terms and conditions of the agreement to sell dated 3-7-1989 Exh.P.1 and made all efforts to get the agreement to sell performed even within the specified time. In this context learned counsel submitted that there was no allegation of any default having been committed by the respondent in not offering or paying balance of sale price to the appellants.

8. The learned counsel further submitted that mentioning of a specific period for completion of agreement in the sale

agreement Exh.P.1 cannot stand in the way of the respondent from seeking the specific performance of the agreement through indulgence of the court if the appellants-vendors do not fulfil their commitments under the agreement within the stipulated period. It was further argued that one of the circumstance negating the treating of time as the essence of the contract in the present case is that the agreement does not contain any clause that if the agreement to sell Exh.P.1 is not completed within the stipulated period of three months, the sale agreement shall cease to exist.

9. The learned counsel for the respondent further contended that a consistent view of the superior courts is in favour of the proposition that time is never treated as of the essence of the contract in cases of sale of immovable property and that in case the vendor raises such a plea he has to establish the fact before the court that the intentions of the parties was to treat the time as essence of the contract and in this respect the vendor has to establish the serving of specific notice of the recession of the contract immediately before or after the expiry of the stipulated period. The learned counsel submitted that no such notice was served upon the respondent by the appellants and that the learned Civil Judge has rightly decreed the suit in favour of the respondent for specific performance of the agreement Exh.P.1. In view of the peculiar circumstances of the instant case reliance has been placed upon *Abdul Hamid v. Abbas Bhai --- Abdul Hussain Sodawatenwala* (PLD 1962 SC 1), *Habibullah Khan and*

others v. Qazi Muhammad Ishaq and others (PLD 1966 SC 359), Seth Essabhoy v. Saboor Ahmad ((PLD 1972 SC 39), Syed Arif Shah v. Abdul Hakeem Qureshi (PLD 1991 SC 905), Mst. Amina Bibi v. Mudassar Aziz (PLD 2003 SC 430), Abdul Karim v. Muhammad Shafi and another (1973 SCMR 225), Barkat Ullah through Legal Heirs and 12 others v. Wali Muhammad through Legal Heirs and 3 others (1994 SCMR 1737), Mrs. Mussarat Shaukat Ali v. Mrs. Safia Khatoon and others (1994 SCMR 2189), S.V. Sankaralinga Nadar v. P.T.S. Ratnaswami Nadar and others (AIR 1952 Madras 389), Muhammad Wazir v. Chaudhari Jahangiri Mal and others (AIR (36) 1949 Lahore 72), MuIla Badaruddin v. Master Tufail Ahmed (AIR 1963 Madhya Pradesh 31), Jamshed Khoduram Irani v. Burjorji Dhunjibhai (AIR 1915 Privy Council 83), Chamarti Suryaprakasarayadu v. Arardhi Lakshminarasimhacharyulu and others (AIR 1914 Madras 462), Osmond Beeby v. Khitish Chandra Acharya Chaudhuri and others (AIR 1915 Calcutta 13), Government of Punjab (Health Department) through Secretary, Health Lahore and another v. Mussarat Uzma Usmani and others (PLD 1987 Lahore 166(1), Messrs Pioneer Housing Society (Pvt.) Limited through Managing Director Bank Square, Lahore v. Messrs Babar & Company through Shakir Ali Khan and 2 others (PLD 1999 Lahore 193), Muhammad Nawaz Khan and another v. Mst. Farrah Naz (PLD 1999 Lahore 238), Bashir Ahmad and 4 others v. Muhammad Ramzan and another (1988 CLC 1600), Mst. Munawar Bibi v. Mst.

Maheen Quddusi (1986 CLC 1887), Muhammad Sharif v. Mst. Faji and others (1996 CLC 883), Abdul Habib Durrani v. Toriali (1999 CLC 207) and Lal Din v. Muhammad Sardar and 3 others (2002 YLR 1482).

10. We have considered the arguments of the learned counsel for the parties and have perused the record.

11. The agreement to sell dated 3-7-1989 is an admitted document as both the parties have not challenged its execution or existence. The only point which is the foundation of the controversy between the parties is that the appellants are treating the period of three months specified in the agreement as a circumstance of treating the time as an essence of the contract whereas the respondent contended that notwithstanding the fact that a period of three months was stipulated in the agreement for completion of the agreement to sell and for effecting registered sale-deed in favour of the respondent nevertheless the parties never intended to treat the time as an essence of the contract. The agreement to sell Exh.P.1 has been closely scrutinized by us with the assistance of the learned counsel for the parties and we find that the parties fixed this period of three months from 3-7-1989 to 3-10-1989 for completion of the registered sale-deed. An amount of Rs.500,000/-was paid by the respondent as earnest money which fact is also admitted by the appellants and the remaining amount was to be paid by the respondent at the time of the execution of the registered sale-

deed in his favour. As per agreement to sell Exh.P.1 the appellants were to arrange the documents of revenue papers, clearance of excise, electricity, water and gas bills within the said period of three months and in clause No.8 of Exh.P.1, the obligation was created for the respondent that if he does not pay the balance of sale price to the appellant within stipulated period of three months the earnest money shall stand forfeited. In clause 9 of the agreement it was provided that if the appellants do not complete the registration of sale-deed in favour of the respondent within three months period, or adopt dilatory tactics then they will pay double the amount of the earnest money to the respondent however an option was also given to the respondent to get sale-deed forcibly effected thro the indulgence of the court. There is no clause in the agreement to sell to the effect that if the agreement to sell Exh.P.1 could not be completed within the period of three months as stipulated this agreement shall cease to exist. Admittedly in the instant case the appellants did not serve any notice upon the respondent to the effect that they had arranged the documents as was their required obligation as per terms and conditions of the agreement within the stipulated period nor the appellants terminated the agreement to sell immediately upon the expiry of the stipulated period on account of any alleged default of the respondent. No intention of the appellants has also been conveyed to the respondent after the expiry of the period of three months that the appellants have forfeited the earnest money.

12. Section 55 of the Contract Act, 1872 deals with the situation when an agreement to sell is executed between the parties with a clause specifying the time for its completion and the effect of non-performance of such an agreement within the specified time. Section 55 is reproduced below:---

"55. Effect of failure to perform at fixed time in contract in which time is essential.--- When a party to a contract promises to do a certain thing at or before a specified time or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable, at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

13. The perusal of section 55 highlights that in case where an agreement to sell is executed between the parties and the time is specified for completing the agreement then so much of the part of the agreement and if agreement which has not been performed within the specified time becomes voidable at the option of the promisee, if the intention of the parties was that time should be the essence of the contract. This effect of voidability of the contract has to be demonstrated by the promisee by doing some overt act. None of the parties can however unilaterally treat the time fixed in the contract to be an essence of the contract. In the circumstances of the present case we have seen that the respondent appeared as P.W.3 in his evidence and categorically stated that he had contacted a number of times the appellants requesting them to accept the balance sale price within the stipulated period and complete the registration of the sale-deed in his favour.

In this context P.W.1 Raja Muhammad Yousaf stated in his cross examination that during this stipulated period of three months the respondent/plaintiff had gone 10/11 times to the appellants for completion of the sale agreement but the appellants kept on adopting dilatory tactics. We have examined the written statement submitted by the appellants also and in none of its paragraphs the appellants have taken the plea that after the expiry of the three months period the agreement to sell lost its existence nor any such clause was incorporated in the agreement to sell that immediately after the expiry of the said agreement, it shall cease to exist or be not enforceable. The learned counsel for the appellants then argued that effort was made by the respondent to add an extension of the time clause on the reverse side of the agreement Exh.P.1 however this clause does bear the signatures of the parties therefore the intention to treat the time as an essence of the contract be inferred from this circumstance. We are not convinced with this contention of the learned counsel for the appellants. The consistent view of the superior courts in this context is that agreements to sell in respect of immovable property are never treated to be binding unless and until the intention is also expressed in the agreement that in case the agreement to sell is not specifically enforced within the stipulated and specified period then the agreement shall cease to exist or be not enforceable after the expiry of the period. In the judgment reported as Abdul Hamid v. Abbas Bhai -- Abdul Hussain

Sodawaterwala (PLD 1962 SC 1) the following principle of law was laid down:---

"An intention to make time of the essence of the contract must be expressed in unmistakable language; it may be inferred from what passed between the parties before, but not after, the contract is made. Equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time."

In judgment reported as Bashir Ahmad and 4 others v. Muhammad Ramzan and another (1988 CLC 1600) while interpreting the question of treatment of time as essence of contract the following law has been laid down at page 1603:-

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"A bare perusal of this stipulation unmistakably spells out an indisputable right on the appellants-promises to enforce the contract through Court in case the respondents did not abide by it. It obviously contemplated completion of the contract through Court even after the expiry of the terminal date and was a clear negation of intent of making the time of the essence of the contract. In fact the appellants were doing exactly what the above-mentioned clause authorized them and no objection could be taken to the process adopted by them. It will be desirable to examine the other clause which the learned counsel emphasized much to claim that in case the appellants failed to pay the amount in time, the earnest money earlier advanced by them would stand forfeited. I do not think this clause could be of any assistance to the respondents. Firstly it will yield to the one conferring a right of forcible registration of the sale-deed on the appellants even after expiry of the deadline. Secondly it is penal in nature which is always in the discretion of the Court as per section 74 of the Contract Act. Thirdly, it was not relied upon in the written statement. Fourthly, the respondents did not give any notice to the appellants asking them to abide by the fixed time. Such notice was essential according to rule enunciated in Mst. Munawar Bibi's case. Fifthly, right to forfeit the earnest money by itself did not suffice that time was of the essence of the contract. Some sort of urgency or compulsion persuading the respondents to complete the sale within a limited span of time should have been clearly denoted to make the appellants aware of any consequence adverse to their interest in case they could not carry out the sale in time. No such element was included in the agreement nor made clear to the appellants subsequently. For all intents it appeared to be a usual sale containing the usual confiscatory clause. According to the rule laid down in Seth Essabhoy's and Ghulam Nabi's cases time here was not of the essence

of the contract."

In the judgment reported as Messrs Pioneer Housing Society (Pvt.) Limited through Managing Director Bank Square, Lahore v. Messrs Babar & Company through Shakir Ali Khan and 2 others (PLD 1999 Lahore 193), a learned Division Bench at page 198 has laid down the following principle of law:---

"In the matter of agreements pertaining to immovable property, the time is ordinarily not the essence of the agreement, and if the parties desire that strict adherence to the time should be ensured, then the terms of the agreement should be so specific which would leave no room of doubt that any deviation from the time clause would entail penal consequence. Similarly, the conduct of the parties should be such which should be evidence of the fact that the violation of the time clause will not be compromised. This can be ensured, if on the expiry of the stipulated time, the vendee issues a notice for the rescission of the contract. In the absence of any notice for the rescission of the contract it could not be assumed that the vendor had treated the time clause as essence of the contract. In the present case no notice was served for the rescission of the contract. So much so, the vendor offered to transfer the land on receiving balance sale consideration after the time had expired which would mean that the time was not treated to be as essential part of the contract."

In another judgment on the subject reported as Mst. Amina Bibi v. Mudassar Aziz (PLD 2003 SC 430). The following law was laid down on the subject in paragraph No.13 of the judgment:---

"It is well-settled that intention to make time 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 intended by the parties the terms of the contract do not permit of any other interpretation. Both the learned counsel have heavily relied upon Abdul Hamid v. Abbas

Bhai-Abdul Hussain (PLD 1962 SC 1), which reiterates the legal proposition as to whether the time was of essence of a contract, it may be inferred from what passed between the parties before but not after the contract is made. Equity will not assist where there has been undue delay on the part of one party to the contract and the other has given him reasonable notice that he must complete the contract within a definite time. In the case in hand, it has been found as a matter of fact that the appellant neglected to perform her part of the contract whereas the respondent had issued timely notice to her for discharge of her obligation by executing the relevant documents. Mr. Dogar agitated that it was incumbent upon the respondent to obtain No Objection Certificate from the Society for transfer of the plot in his favour but as no such plea was taken at the trial of the suit, we are not inclined to entertain the same at this stage. Refer Zaheer Ahmed v. Abdul Aziz (1983 SCMR 559). Suffice it to observe, conduct of the parties tends to reflect that the respondent, though a property dealer by profession, was anxious for completion of the contract within the stipulated period. It was the appellant, who avoided and neglected to perform her part of contract with a view to frustrate the contract. Learned counsel submitted that by not tendering the balance consideration to the appellant, respondent had rendered the contract void and she was entitled to revoke the same. We do not feel persuaded to agree with the submission of the learned counsel as concurrent findings of fact are against her, which do not suffer from misconception of law or misconstruction of evidence. Learned counsel relied upon Bahawood-Deen v. B.G. Desouza (PLD 1974 Quetta 36) and Ghulam Nabi v. Muhammad Yaqub (PLD 1983 SC 344). Both the cases reiterate the principle enunciated in the earlier judgments that mere mention of time in a contract for sale of immovable property for its performance does not necessarily mean that time was of essence of the contract. Intention of parties in that behalf can be gathered from the terms of the contract and facts and circumstances of the case. Besides the above said cases, rule of law was clearly laid down in Essabhoy v. Saboor Ahmad (PLD 1973 SC 93). Zaheer Ahmad v. Abdul Aziz (1983 SCMR 559), Muhammad Yaqub v. Muhammad Nasrullah Khan, (PLD 1986 SC 497), Mussarat Shaukat Ali v. Safia Khatoon (1994 SCMR 2189) and Sandoz Limited v. Federation of Pakistan (1995 SCMR 1431). In Zaheer Ahmad (supra), it was held that a party guilty of prevention of completion of contract within time could not plead that time was essence of the contract. This principle was reiterated in Mussarat Shaukat Ali (supra),. Saeeduzzaman Siddiqui, J. (as his Lordship then was) speaking for the Full Bench observed as under:---

"It is open to the parties while entering the agreement of sale in respect of an immovable property to provide that the time for performance of the agreement will be treated as essence of the contract. In such cases, if the party seeking enforcement of the contract is shown to be in breach of the contract, the Court may in appropriate cases refuse to enforce the contract. However, in the absence of a provision in the agreement to sell an immovable property that the time fixed for performance of the contract is to be treated as the essence of the contract, the time fixed for performance of the contract is not treated as the essence of the

contract. Therefore, specific performance of an agreement of sale relating to immovable property can be granted by Court even after expiry of the period fixed in the contract."

The observation of the honourable Supreme Court of Pakistan in paragraph No.15 of the above judgment is also relevant and is reproduced below:---

"In the facts and circumstance of the case, fully described in the narrative of this judgment, analysed by the Courts below, in our view, have been correctly and consciously construed. In our view, by mentioning a period of one month for completion of the transaction in the agreement of sale, the parties did not intend to make the time of the essence of the contract. At any event, appellant herself has been found to be in breach of the contract and she cannot be permitted to take the advantage of her own wrong. Alternatively, assuming for the sake of arguments, respondent was in breach of contract, in law and equity, appellant was under an obligation to provide reasonable time to the respondent for performance of the part of contract before resorting to hasty and abrupt revocation of the contract before expiry of 30 days. Obviously, it was not stipulated in the agreement that in case respondent failed to perform his part of the contract, it would stand revoked and the only stipulation in the agreement was that on his failure to make payment, as stipulated, earnest money of Rs.20,000 would stand forfeited. No other circumstance has been pointed out to lead to the contrary view. We are, therefore, firmly of the opinion that time was not of the essence of the contract as rightly held by the Court below."

14. In view of the case-law discussed above and on account of the established circumstances of the instant case we find that there is no allegation by the appellants that the respondent neglected in performance of the agreement during the stipulated period nor was there any clause in the agreement Exh.P.1 to the effect that in case the agreement is not performed within the stipulated period of three months it will cease to exist or that the agreement to sell will stand revoked. The appellants did not take this plea in the written statement that immediately after the expiry of the period of

three months stipulated in agreement to sell, the agreement stood revoked nor did the appellants serve any notice upon the respondent on account of his alleged neglect that the contract was not completed within the stipulated period and it therefore stood revoked nor any evidence was produced by the appellants to the effect that immediately after the expiry of the period of three months stipulated in the agreement for its completion, the agreement stood revoked and ceased to be enforceable. The appellants in fact did not serve any notice upon the respondent at all to the effect that the earnest money advanced by the respondent stood forfeited after the expiry of the stipulated period nor any such evidence was produced by the appellant during the trial. We do not therefore accept the contention of the learned counsel of the appellants that the time in the instant case was intended to be treated as essence of the contract by the parties. The learned Civil Judge while recording the findings on Issue No.1 has recorded valid reasons for rendering his finding in favour of the plaintiff-respondent. The judgment and decree dated 6-2-1996 has been rightly passed in favour of the respondent. We do not find any force in the instant R.F.A. which is dismissed with no orders as to costs.

(Mian Shahid Iqbal)
Judge

(*NASIR SAEED SHEIK*)
Judge