

IN THE HIGH COURT OF SINDH, KARACHI

Ind Appeal No. 86 of 2014

Mst. Nargis Ehsan Malik and four others.....Appellants.

Versus

Arshad Mehmood Mir and four others.....Respondents.

JUDGMENT

Date of hearing : 29th May, 2018.
 Date of Judgment : 29th August, 2018.
 Appellants : Mr. Zeeshan Abdullah, advocate
 Respondent : Mr. Shahid Qadeer, advocate.

>>>>>>> <<<<<<<<<

Kausar Sultana Hussain, J:- This Second Appeal under Section 100 of C.P.C. assails judgment and decree dated 19.08.2014 and 22.08.2014 respectively, passed by the learned Vth Additional District Judge Karachi South in Civil Appeal No. 90 of 2013, whereby the judgment and decree dated 23.03.2013 and 30.3.2013 respectively, passed in Civil Suit No. 668 of 2003 (old No. 876 of 1995) by VIth Senior Civil Judge, Karachi South, were upheld.

2. Short factual background of the case is that the Civil Suit No. 668 of 2003 (old No. 876 of 1995) was filed by the respondents/plaintiffs for Specific Performance against the appellants/defendants and others, stating therein that the appellants/defendants No.01 to 05 are joint owners of Commercial Plot No. 11-C, Sehar Lane-3 measuring 200 Sq. Yards. Phase-VII, DHA Karachi (suit property) by way of inheritance from late Malik Ehsan Elahi. The appellant/defendant No.01 for self and being guardian of her children i.e. appellants/defendants No.02 to 05 with permission of learned Guardian Judge Lahore, on 25.06.1994 entered into an agreement with respondent/plaintiff for the sale of suit property at lump sum price of Rs.700,000/= (seven lacs) and received a sum of Rs.50,000/= in cash from respondent/plaintiff towards the part payment of agreed sale consideration of suit property. While entering into an agreement with respondent/plaintiff, the appellant/defendant No. 01 delivered the photo copies of documents i.e. guardianship certificate dated 11.10.1988, application for

permission to sell the shares of appellants/defendant No.02 to 05 & Guardian Judge's order passed thereon dated 04.05.1994. On 21.11.1994, appellant/defendant No. 01 received a further sum of Rs.150,000/= in cash as part payment from respondent/plaintiff towards sale consideration, which she acknowledged by executing a fresh sale agreement and receipt in favour of respondent/plaintiff. Under instructions and authority of appellants/defendants No. 01 to 05, respondent/plaintiff through M/s. Tooba Estate, completed the necessary formalities for getting the mutation of suit property effected in their names by defendant No.06/DHA, who effected the mutation of suit property in favour of appellants/defendants No.01 to 05 vide its mutation order No. DHA/SSI/WL-6310 dated 17.01.1995. On receipt of mutation letter, respondent/plaintiff intimated appellant/defendant No.01 that balance sale consideration amounting to Rs.500,000/= is ready and asked her to execute transfer documents of suit property in his favour before defendant No.06. The appellant/defendant No. 01 informed respondent/plaintiff that appellants/defendants No.04 & 05 had become major and were in England, and advised respondent/plaintiff to send them transfer documents of their shares so that they may got executed in England. Accordingly respondent/plaintiff sent the same to appellant/defendant No.01 for forwarding the same to appellants/defendants No.04 & 05, which she did and appellants/defendants No. 04 & 05, transferred the same in favour of respondent/plaintiff on 10.03.1995 before High Commission for Pakistan in London. On 16.07.1995 appellant/defendant No.01 for self and being guardian of appellants/defendants No. 02 & 03 prepared transfer documents in favour of respondent/plaintiff and submitted the same alongwith transfer documents executed by appellants/defendants No. 04 & 05 before defendant No.06/DHA, who issued such receipt dated 16.07.1995. After scrutiny of said transfer documents on 20.07.1995, defendant No.06/DHA requested appellant/defendant No.01 to provide a legible copy of Guardian's Court order dated 04.05.1994, but appellant/defendant No.01 through her Advocate's letter dated 17.08.1995 addressed to defendant No.06 showed her reluctance to produce the same. On 17.09.1995 defendant No.06 replied the said letter of the

appellant/defendant No.1 and also sent copy of the same to respondent/plaintiff, who lodged his protest but appellant/defendant No.01 did not give any satisfactory reply and sent the said letter to respondent/plaintiff through M /s. Tooba Estate, on receiving of the same, respondent/plaintiff again requested to appellant/defendant No.01 for performance but she avoided. On 25.11.1995 respondent/plaintiff sent a legal notice to the appellant/defendant No.01 but she refused to accept the same. The copy of said legal notice was also sent to defendant No.06 with request not to effect the transfer of suit property in favour of any other person. The respondent/plaintiff is ready to perform his part of contract but appellant/defendants No.01 to 05 have refused to perform their part of performance, hence respondent/plaintiff filed a suit with following prayers:-

- i) Pass judgment and decree in favour of the plaintiff and against the defendant No. 01 to 05 for specific performance of the sale agreement dated 25.06.1994 directing them to effect the transfer of the suit property i.e. commercial Plot No.11-C, Sehar Lane-3, Phase-VII, measuring 200 Sq. Yds. Pakistan Defence Officer's Housing Authority, Karachi in favour of the plaintiff and in case they fail to transfer the suit property in favour of the plaintiff then the Nazir of the Court be directed to effect the transfer of the suit property in favour of the plaintiff on depositing by him the balance sale consideration of the suit property amounting to Rs.500,000/= with the Court.
- ii) Grant permanent Injunction restraining the defendants, their heirs, representatives, agents, successors-in-interest/office from transferring the suit property in favour of any person other than the plaintiff in any manner whatsoever.
- iii) Grant costs of the suit.
- iv) Grant any other relief or reliefs which this Court may deem just and proper under circumstances of the case.

3. After admission of the suit, process were issued to the appellant/defendants accordingly. The appellants/defendants No. 1 to 3 filed their joint written statement,

wherein they denied the allegations levelled against them and averred that respondent/plaintiff deliberately and intentionally not impleaded M/s. Toba Estate, which is necessary party. They further averred that the stipulated time for part performance of contract has elapsed and sale agreement dated 21.11.1994, had consequently been cancelled and advance amount has been forfeited as such suit is not maintainable; that the appellant/defendant No. 1 was appointed as guardian of the appellants/defendants No. 2 to 5 and she did not execute sale agreement for the shares of the appellants/defendants No. 2 to 5. That the appellant/defendant No. 1 received a sum of Rs.50,000.00 from the respondent/plaintiff and as per clause-2 of sale agreement dated 25.6.1994, the respondent/plaintiff was required to pay balance amount of Rs. 6,50,000/- on or before 7.8.1994, but the respondent/plaintiff willfully failed to pay said amount within stipulated time, as such, appellant/defendant No. 1 verbally canceled the sale agreement dated 25.6.1994. The second sale agreement was executed on 21.11.1994 between the appellant/defendant No. 1 and the respondent/plaintiff and defendant No. 1 received a sum of Rs.1,50,000/- from respondent/plaintiff and as per clause-4 of the said agreement, the respondent/plaintiff was obliged to pay all the dues of DHA outstanding against the said plot and also get the said property mutated in the name of the appellants/defendants No. 1 to 5, however, the respondent/plaintiff intentionally failed to fulfil his contractual obligations and the appellant/defendant No. 1 had paid all expenses of DHA and got the suit property mutated in her name and in the name of other appellants. That after the execution of the second sale agreement dated 21.11.1994, the respondent/plaintiff sent numerous blank papers to the appellants/defendants for their signatures, which they did in good faith, thereby the respondent/plaintiff without paying full payment with malafide intention claimed that the suit property has been sold by all the appellants/defendants to him. Lastly, they prayed for dismissal of the suit of respondent/plaintiff with special cost.

4. The appellants/defendants No. 4 and 5 did not file their written statements, therefore, on 24.9.1998, the matter was ordered to be proceeded as ex-parte against them. The defendant No. 6 (DHA) being proforma defendant did not contest the

matter, therefore, the DHA in Ist appeal did not implead as one of the respondents.

5. Initially the respondent/plaintiff has filed the suit before this Court but subsequently, due to change in pecuniary jurisdiction of sub-ordinate Courts, the said Suit was transferred from this Court to the Court of learned District & Sessions Judge, Karachi South, from where it was again transferred to the concerned Court of learned IInd Senior Civil Judge, Karachi South on 22.2.2003 for adjudication. Later-on in 2007, due to death of plaintiff/respondent, his legal heirs were brought on record through amended title submitted on 15.1.2011. On 22.2.2012 due to death of defendant No. 1 her legal heirs were brought on record through filing amended title on 09.03.2012 by the learned counsel for the defendant's legal heirs. On 04.01.2012, attorney of the respondent/plaintiff namely Arif Shahbaz Mir filed his affidavit in evidence as Ex. P/1. He also produced Special Power of Attorney, agreement to sale dated 25.6.1994, order dated 19.9.1988 passed by Guardian Judge-1, Lahore in Guardian Case No. 131/GC/1988, application for permission to sale the property on behalf of minors and order passed thereon dated 4.5.1995 alongwith its fair copy, agreement to sale dated 21.11.1994, receipts dated 08.11.1994, 21.11.1994, receipt of dues paid by the plaintiff to DHA, letter dated 24.11.1994, proforma of application, receipts dated 1.12.1994, 19.12.1994, Transfer/mutation order dated 17.1.1995, applications for registration of the defendant No. 1 to 3 in category-C of DHA, receipt dated 21.1.1995, original telegram and its receipt dated 22.1.1995, temporary receipt dated 16.7.1995, letters dated 20.7.1995 and 17.9.1995, letter sent by Ch. Manzoor Hussain Advocate, legal notice dated 25.11.1995, TCS receipt, original undelivered legal notice alongwith its envelope, confirmation report, application for removal of Guardianship, notice issued by Guardian Judge, objections and certified copy of judgment dated 17.11.1997, vide Ex. P/2 to P/31. The plaintiff's/respondent's attorney was cross-examined by the counsel for the defendants/appellants. Thereafter, on 15.2.2013, the suit was transferred to IVth Senior Civil Judge, Karachi South, as per order of learned District & Sessions Judge, Karachi South, and on 19.2.2013, witness of plaintiff namely Abdul Sami Khan was examined as PW-2 at Ex. P/32. He was cross-examined by the learned Advocate for the appellants/defendants No. 3 to 5.

Learned advocate for the respondent/plaintiff closed their side vide statement dated 19.2.2013 and matter was posted for the appellants/defendants evidence, but defendant side failed to lead their evidence, hence on 11.03.2013 trial Court closed the side of appellant/defendants for evidence. Consequently, his Advocate filed an application for recalling of order dated 11.3.2013, which was allowed by consent, vide order dated 14.3.2013, however, due to unavoidable circumstances, the appellant No. 3/defendant No. 3 could not come from Lahore to lead her evidence, and the learned trial Court again closed their side, vide order dated 16.3.2013. Thereafter, her advocate filed an application for re-calling of said order. The said application was dismissed with cost of Rs.5,000/-. Subsequently, the learned trial Court passed judgment dated 27.3.2013 and decreed the suit of the respondent/plaintiff. The appellants/defendants being aggrieved by the said judgment and decree filed first appeal, which has also been dismissed, hence this Second Appeal.

6. I have heard the learned counsel for the parties at length and also have perused the relevant record and case laws relied upon by the learned counsels for the parties.

7. The learned counsel for the appellants/defendants after discussing the detail of the facts of the case, has argued that the main and core question involved in the instant appeal is that “When, admittedly, earlier sale agreement dated 25.06.1994 was superseded by a fresh sale agreement dated 21.11.1994, which stipulated its own terms and conditions whether the suit for specific performance of previous sale agreement dated 25.6.1994 was maintainable? Or decree for enforcement of such previous agreement could be awarded? In this regard he made submissions that the impugned judgment and decree of the learned trial Court is contrary to the provisions of law i.e. section 62 of the Contract Act, which deals with the effect of novation, rescission and alternation of contract and according to that provision, if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not to be performed. The learned counsel for the appellant further submitted that, since the suit was filed on the basis of first sale

agreement (which otherwise was ceased to exist), therefore, the suit ought to have been dismissed by the learned trial Court being non-maintainable rather to decree it. Reliance is placed by him on the following case laws :-

- i. 1994 SCMR 2189 at 2200,
- ii. PLD 1964 SC 337 at 372,
- iii. 2005 CLC 1207 at 1213,
- iv. 1994 CLC 2272 at 2276,
- v. 2003 CLC 496 at 503,
- vi. PLD 2011 Karachi 24 at 31,
- vii. 2000 CLC 1502 at 1505,
- viii. 1992 MLD 2245 at 2248 and
- ix. 2004 CLD 1715 at 1723.

8. Mr. Zeeshan, the learned counsel for appellant/defendant submitted that infact both the Courts below have not applied relevant provisions of law, hence, this 2nd Appellate Court under Section 100 CPC, 1908, competent to set aside concurrent findings. Reliance is placed on 1986 SCMR 373 at 375. The learned counsel has argued on the point that why the plaintiff did not file suit on the basis of fresh/second sale agreement and sought specific performance of first sale agreement? Per learned counsel there was a reason for such deliberate choice as both the agreements stipulated own terms and conditions and since the plaintiff failed to perform his part of contract, as a consequence of which, the deal was cancelled, therefore, respondent/plaintiff opted to file suit on the basis of first sale agreement, in which time was not essence of the contract. According to learned appellant's counsel, even if, in an agreement time/date for performance or balance payment is mentioned, still it cannot be said that time was essence for the said contract unless for non-compliance some penal consequences are provided. On the test as to when time can be said to be essence of an agreement, reliance is placed on the following case laws

- i. 2010 SCMR 334 at 340,
- ii. 2004 SCMR 436 at 438,
- iii. PLD 2014 SC 506 at 523 and
- iv. PLD 1983 SC 344.

9. It has been held in 2010 SCMR 334 by the Hon'ble Supreme Court of Pakistan that **“It is settled principle of law that, to held as to where time is of essence of the contract, it is always to be determined from the circumstances of each case and of each contract. If it is simply written that some agreement is to be performed with a certain period, this by itself cannot be considered to be of essence of the contract. But when the non-performance within such period entails upon certain consequences and such consequences are also given in the contract, the time becomes of essence.”**

10. Mr. Zeeshan, learned advocate for the appellants has further argued that, if both the admitted sale agreements of the instant case, (Exh.P/3 & Exh. P/7) be tested in the light of aforementioned principle of law, it would be revealed that Clause 2 of the first sale agreement (which otherwise ceased to exist under section 62 of the Contract Act, 1872) dealt with the balance amount of Rs.650,000/- which was liable to be paid at the time of transfer of the said plot in the office of the Pakistan Defence Officers Housing Authority Karachi on or before 7th August, when the said immovable property was formally to be handed over to the vendee or any of his nominees together with all documents related to it, whereas in the second sale agreement parties crossed/deleted clause-2 of the first agreement written in English language, and agreed for balance payment and consequence of failure mentioned in Urdu language which provided that the balance amount shall be paid to the appellant No. 1/defendant No. 1, (late Mrs. Nargis Ehsan), within seven days by the respondent/plaintiff from the date of transfer of the suit property in the names of Appellants/defendants otherwise entire deal shall be cancelled and the said paid amount shall be forfeited, the said clause with regards to balance payment is an admitted clause. Mr. Zeeshan Abdullah has further submitted that since first agreement after execution of 2nd agreement did not exist, hence, suit on the basis of such 1st agreement is not maintainable and liable to be dismissed. Reliance is placed by him **AIR 1960 Mysore 59 (V 47 C14) at 64 and 1988 CLC 1755 at 1760**. The learned appellants counsel pointed out here that the plaintiff while admitting the execution of second agreement (Exh.P/7) only taken plea for non-payment that allegedly appellant/defendant No. 1 was not in Karachi, but at

Lahore, therefore, balance payment, according to the respondent/plaintiff, could not be made and, as per respondent's/plaintiff's version, during the said seven day's period, the respondent/plaintiff dispatched a telegram dated 22.1.1995 (property was transferred in the names of appellants/defendants on 17.01.1995) contents of said telegram show that the respondent/plaintiff allegedly informed the appellant No.1/defendant No. 1 that payment is ready which may be received by the appellant No. 1/defendant No. 1 upon execution of transfer documents in favour of the plaintiff. Per learned counsel for the appellants/defendant in the impugned judgment, the learned trial Court given extra ordinary weight to the said purported telegram by concluding that the plaintiff fulfilled his part of contractual obligation by sending aforesaid telegram within the said stipulated period, on the other hand the learned trial Court while relying upon the said telegram failed to appreciate that during the cross-examination the defendant No.1's counsel taken specific plea that the said telegram is forged and manipulated document but yet the trial Court believed on the said telegram that had been allegedly dispatched without considering fact that there is nothing on record or nothing produced to prove that such telegram was received by the addressee, so here question arises that when the said purported telegram was not received by the appellant/defendant No. 1, than how such communication can safely be relied upon. The learned counsel for the appellant/defendant has further argued that the findings of the learned trial court, particularly, based on the first agreement by observing that the first agreement was neither cancelled nor first advance forfeited by the second agreement while it is contrary to the provisions of section 62 of the Contract Act, 1872 as upon the alteration/execution of fresh agreement, the previous agreement, if any, by virtue of aforesaid provision of the Contract Act stood superseded automatically at the time of transfer in favour of the Plaintiff in DHA was replaced with payment within seven days from the transfer in favour of Defendant. So far payment of balance amount is concerned, transfer in favour of defendant No.1 in DHA was not a condition. The Plaintiff after transfer of documents in favour of Defendants said that payment is ready therefore, defendant No. 1 come and execute transfer documents before DHA, means he neither issued any cheque or pay order of

balance amount nor made payment by any other mode rather sought enforcement of clause No.02 of the first agreement, which was admittedly superseded/substituted by the new clause in 2nd sale agreement. He further argued that if the present case is seen in juxtaposition with an admitted factual position in the instant case that neither the plaintiff paid balance amount within stipulated period nor even deposited in court on filing the suit, in fact, not till to-date despite decree in his favour even during pendency of 1st Appeal and till today means during almost about 25 years, he failed to make payment of balance amount hence, it can safely be concluded that the respondent/plaintiff was neither willing nor ready to perform his part of contract, hence, was/is not entitled for the decree of specific performance of contract. It is further submitted that findings of the learned trial court on the issue No.1 only based on the finding of Guardian and Ward Judge Lahore, meaning thereby no separate finding/adjudication was taken place.

11. Mr. Zeeshan Abdullah, the learned counsel for the appellants/defendants has relied upon 2002 YLR 3018 at 3019, 2007 YLR 992 at 999, 2003 SCMR 953, 2015 MLD 49 at 53 and submitted that the learned trial court decreed the suit of the respondent/plaintiff as per prayer clause 1 of the plaint, whereby the respondent/plaintiff was directed to pay balance amount as per the value of the said amount in the year 1994 according to national saving scheme. Without prejudice to the Appellant's main case, the learned counsel for appellant/defendant submitted that the suit for specific performance of the contract was not maintainable and therefore liable to be dismissed and therefore, impugned judgment & decrees are liable to be set aside, even if, for a moment, one were to concede that the specific performance of the contract has rightly been allowed to the Plaintiff, even than the conclusion drawn by the learned trial court in respect of balance sale consideration is contrary to the law established by the Hon'ble superior courts of Pakistan, as in many of the judgments the Hon'ble Supreme Court of Pakistan increased amount in sale price in suits substantially for specific performance of the contracts if the prices, as per ground reality appears to have been increased manifold. Had the balance amount of Rs.500,000/=, in the present case, deposited in court in last 25

years it could accrue a considerable profit from which Appellants have been deprived. Reliance is placed on the following case law:

1. 2000 SCMR 533 at 539
2. 2001 MLD 1518.
3. PLD 2010 SC 952 at 958
4. 1989 CLC 2309 at 2323
5. 2010 SCMR 286 at 300
6. 2013 CLC 1570 at 1579
7. 2013 CLC 316 at 324 and
8. 2016 MLD 1665 at 1670.

12. The learned counsel for appellant/defendants has prayed that this court may be pleased to set aside both the judgments and decree, and dismiss the plaintiff's suit or alternatively, the respondents may be asked to pay balance amount as per present market value.

13. The learned counsel for the respondents/plaintiffs argued that appellant No. 1 (the mother of the appellants) filed an application for permission to sell the shares of the minors/co-sharer of the property, which was granted by the learned Guardian Judge, Lahore, vide order dated 04.05.1994 in favour of appellant No. 1/Mrs. Nargis Ehsan Elahi and after obtaining permission to sell the suit property from the Guardian Judge, Lahore, she had entered into an agreement to sell the said property in totality with Arshad Mahmood Mir (Predecessor of the respondents/plaintiffs) dated 25.6.1994. The respondent's/plaintiff's predecessor under the instruction and authority of appellants No. 1 to 5, completed necessary formalities for getting the mutation of the property effected in their names from the concerned authority vide letter dated 17.1.1995, Ex. P/15 and intimated such fact to the appellant No.1/Mst. Nargis through telegram, telephone and estate agent on 22.1.1995, (Ex. P/20) offering her that balance amount is ready, but it was the appellant deceased Nargis Ehsan Elahi, who had failed to appear and execute transfer documents before the DHA (respondent No. 6), and informed that Appellants No.4 & 5/defendants No.4&5 on that time become major and were in England and on advice of Appellant No.1/Defendant No.1 he had sent transfer documents of their share so that they may be executed. He further pointed out that, if it was so then the appellants No. 2 to 5

when they became major may have opted to cancel the sale agreements dated 25.6.1994 and 21.11.1994 by filing the suit in the court of law for the cancellation of both the agreements rather they chosen to remain silent and never appeared in the witness-box to rebut the contentions of the respondents. Further more they never served any notice of cancellation through any advocate nor they returned the earnest money of Rs. 2,00,000/-, which was received by appellant No. 1. He further argued that moreover, it is not the case of the appellants/defendants that they never entered into the sale agreements. On the contrary, on perusal of second agreement dated 21.11.1994 (Exh. P/7), it appears that the sale agreement is on behalf of appellant No. 1/Mst. Nargis Ehsan Elahi and appellants No. 2 to 5 and it is in continuation of the earlier agreement dated 25.6.1994 and the Vendor further received Rs. 1,50,000/- (vide Exh. P/8). He argued that the advance amount of Rs.2,00,000/- is still lying with the appellants/defendants and they never returned the same.

14. The learned counsel for the respondents/plaintiffs Mr. Shahid Qadeer, has prayed for dismissal of instant second appeal with direction to the appellants/defendants to perform their part of contract by executing sale deed in their favour and hand over the possession of the suit property. He has relied on the following case laws.

- i. 1992 CLC 1887 (Karachi).
- ii. PLD 2011 Karachi 24.
- iii. 1989 CLC 238 (Karachi)
- iv. PLD 1987 Karachi 132.
- v. PLD 1994 Karachi 492.
- vi. 1999 YLR 1094 (Karachi).
- vii. PLD 2003 Supreme Court 430.
- viii. PLD 2010 Karachi 295.
- ix. 2000 YLR 378 (Lahore).
- x. 2003 MLD 205 (Karachi).
- xi. 2007 CLC 1372 (Lahore).
- xii. PLD 2010 Supreme Court 952.
- xiii. 2013 CLC 316 (Sindh).
- xiv. 1992 MLD 1787 (Karachi).
- xv. PLD 2011 Supreme Court 323.
- xvi. 2009 SCMR 254.
- xvii. 1996 SCMR 1729.
- xviii. PLD 1994 Supreme Court 291.

15. In rebuttal of the arguments of the learned counsel for respondent/plaintiff the learned counsel for the appellant/defendant has argued that as per contention of

the learned counsel for respondent/plaintiff, Section 62 of the Contract Act does not attract as there was no novation of contract and the second agreement can be treated as merger or ratification of earlier agreement, but the said argument of respondent/plaintiff is misconceived as a plain reading of section 62 shows that if the parties to contract agree to substitute a new contract or to rescind or alter it, the original contract not to be performed as the word “or” is used in the said section twice which makes the said position disjunctive; means a contract either substituted by a new contract or rescinded or altered, if any, section 62 of the Contract Act shall be applicable to such situation if one of the aforesaid three situations exist. It is argued that, in the instant case, as a matter of an admitted fact, two agreements were executed so the agreement dated 21.11.1994 (Second agreement) could not be treated, as per section 62 of the Contract Act, to be either substitution of previous agreement or at least, to the extent of balance payment, alteration of previous agreement and in both the situations, section 62 of the Contract Act fully attracts and the suit filed on the basis of previous agreement was not maintainable.

16. He further argued that there is another aspect which also establishes the aforesaid argument of the Respondents’ counsel to be misconceived and afterthought that in paragraphs No.2 and 18 of the plaint, the Respondent/plaintiff himself pleaded that on 21.11.1994 a **fresh sale agreement** was executed, therefore, now at this stage, it does not lie in his mouth to say that the second agreement was not fresh agreement but ratification of earlier agreement. The Respondent’s counsel cannot argue beyond pleadings and case set up in plaint.

Reliance is placed on the following case law:-

- a. 1988 SCMR 1696 at 1701
- b. 2006 SCMR 562 at 573 and
- c. PLD 2007 SC 582 at 59.

17. The learned counsel for the appellants/defendants has further argued in rebuttal of argument of the Respondent’s counsel that the respondents by sending telegram (Exh. P/20), complied with the condition/term of sale agreement dated 21.11.1994 mentioned in Urdu language, while perusal of clause 2 of the first agreement reveals that for the balance it was agreed that **“the same shall be paid at**

the time of transfer of the said plot in office of the Pakistan Defence Officer Housing Authority, Karachi on or before 7th August, when the said immoveable property is formally handed over to the vendee or any of his nominee together with all documents related to it”, however, in the fresh sale agreement dated 21.11.1994 there was deliberate alteration particularly for the balance payment which provided that *“on the day when the plot would be transferred in the name of defendant No. 1 and her children within 7 days of such transfer balance amount of Rs. 5,00,000/- would be paid by the purchaser otherwise previous entire deal shall stand cancelled with or by all means”*. This was the altered term agreed between the parties for the balance amount which was to be performed by the respondent/plaintiff, not previous one.

18. The learned counsel for the appellant/defendant has further argued in rebuttal of the arguments of learned counsel for the respondent/plaintiff on the point that balance amount was not deposited by the respondents/plaintiffs because no court has passed the order for it and appellant/defendant No. 1 was reluctant to transfer the property in their names therefore, respondent No. 1/plaintiff was not required to deposit balance. Per learned counsel appellant/defendant that the argument advance by the learned counsel for the respondent/plaintiff mentioned Supra has no substance in view of settled law that person, who seeks specific performance of a contract/sale agreement has to approach the court with clean hands particularly with regards to his/her willingness and readiness of his/her part of contract by positive acts like in case of balance amount for any sale transaction has to deposit in court on his own. He further argued on the same point that had the plaintiff been willing and ready to pay balance amount the same would have been deposited by him in court at the time of filing of the suit and by now it is a trite law that it is mandatory for a person who seeks enforcement of agreement on first appearance before the court or on the date of institution of suit, shall apply to the court getting permission to deposit the balance amount and any omission in this regard would entail dismissal of the suit.

19. In reply to the arguments of the learned counsel for the respondent/plaintiff on the point of not leading evidence by the appellant/defendant before trial Court, the learned counsel for the appellant/defendant has submitted that mere weakness of the defendants or his complete absence in the proceedings does not by itself favours plaintiff on holding him entitled for the grant of decree as prayed for, on the contrary, it is an established principle of law that plaintiff has to prove his own case as well as has to make out a case showing that he is entitled for the relief prayed for. The learned counsel for the appellants/defendants Mr. Zeeshan Abdullah has relied upon the following case laws :-

- i. 1992 CLC 1887
- ii. PLD 2011 KHI 24.
- iii. 1989 CLC 238.
- iv. PLD 1987 Kar. 132.
- v. PLD 1994 Kar. 492. and
- vi. 1999 YLR 1094

20. Submissions put forward by the learned counsel for the parties have been considered, the impugned judgments/decrees passed by the Courts below have been minutely perused in the perspective of relevant provisions of law. The root cause of the Civil controversies between the parties is two sale agreements dated 25.06.1994 and 21.11.1994. Per record, the parties entered into first sale agreement on 25.06.1994 in respect of the suit property bearing plot No.11-, Sehar Lane 3, Phase-VII, DHA, Karachi measuring 200 Sq. yards (suit property) against total sale consideration of Rs.7,00,000/- out of which initially the appellants/defendants received a sum of Rs. 50,000/- as part payment and subsequently on 21.11.1994 the appellant/defendant No. 1 received further sum of Rs.1,50,000/- out of total sale consideration of Rs. 7,00,000/- duly acknowledged by her through executing a fresh sale agreement and receipt.

21. The whole crux of arguments of the learned counsel for the appellant/defendant is that since first agreement after execution of second agreement did not exist, hence suit on the basis of such first agreement is not maintainable and liable to be dismissed. Learned counsel for the appellant/defendant has drawn this plea from the provisions of section 62 of the

Contract Act, 1872, according to which by making alternation/execution of fresh agreement, the previous agreement by virtue of section 62 of the Contract Act stood superseded automatically. On the other hand, per learned counsel for the respondent/plaintiff section 62 of the Contract Act does not apply, owing to the reason that in instant matter there is no novation contract and the subsequent agreement is to be treated as merger or rectification of earlier agreement. Before discussing the effect of novation as put forth by the learned counsel for the appellant/defendant, I would like to reproduce here the Section 62 of the Contract Act, 1872 :-

‘Effect of novation, rescission and alternation of contract.’

“If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

22. Bare reading of above mentioned provision of law reveals that novation of contract means the wiping out of the original contract as well as the creation of new valid contract. It is to extinguish all the terms and conditions of the old contract by modifying, altering or rescinding the same so as to arrange a new altered or substantiate valid contract. One of the necessary element for the execution of a valid novation of contract is that parties of the contract are to be agreed to substitute a new contract. In instant case, second agreement was executed after about five months of execution of earlier agreement and as per Clause 2 of the earlier agreement, balance amount of Rs.6,50,000/= was decided to be paid at the time of transfer of the said plot in the office of the Pakistan Defence Officer Housing Authority, Karachi on or before 7th August, (1994), while per Clause 2 of Second sale agreement dated 21st November 1994 payment of balance amount to the vendor by the vendee was decided within three months from the date hereof at the time of delivery of possession of the plot alongwith documents of the title in the name of Vendor in the record of rights maintained by the Pakistan Defence Officer Housing Authority. This typed clause-2 was rescinded letter by putting four lines cross over this clause of second contract while adding two hand written lines in the blank space of the same Clause-2 in Urdu language, whereby payment of balance amount has been made conditional as in earlier agreement payment was to be paid on or before

7th August, (1994), while in second agreement no specific data for payment is mentioned but the vendor bound the vendee to pay it within 7 days from the day of transfer of the suit property in the name of appellants/defendants otherwise not only the previous deals would be canceled but also payment already made (Rs.200,000/-) would be forfeited. It is noted that added Clause-2 in Urdu language and rescinding/cancelling of typed Clause-2 of second agreement was conspicuously signed by the vendor only and no signature of vendee is available thereon although on all the three pages of the second agreement, signatures of both parties are available, which infers that at the time of placing signatures by contracting parties on second agreement, this added Clause in Urdu language was not written; therefore, rescinding and addition are dubious, hence it cannot be relied upon with credence that this alteration was made by the vendor with the consent of the vendee. When only one of the parties to the contract alleges novation or alteration in the original contract fails to establish the same, then mere claim of the novation in the original contract by one of the parties to the contract does not absolve the parties to the original contract from obligation to perform the original contract. The parties can only be relieved from performance of the original contract if they have by mutual consent substituted new contract in place of the original one.

23. In case of novation of contract, the right of the parties under the agreement/contract must be completely extinguished giving way to different rights under the subsequent agreement because a novation is a substitute of contract and not a mere variation of its terms. It is therefore, imperative that before novation can occur it must show the fact that intention of the parties was to substitute a new contract for the original contract, section 62 of the contract act 1872 is therefore, not applicable in this case and case laws relied upon by the learned counsel for the appellant are distinguishable from the facts of the case in hand.

24. Another issue of this case raised by the appellants/defendants is that the predecessor of the respondents/plaintiffs did not pay the balance of sale consideration amounting to Rs.500,000 (Five Lac Rupees) to the predecessor of the appellants/defendants inspite of the fact that they effected mutation of suit

property in favor of the appellants/defendants vide mutation letter dated 17.01.1995, while per second contract they were bound to pay it within seven days from the date of mutation. Conversely, the claim of the Respondents/plaintiffs is that on receipt of mutation letter, the respondents/plaintiffs intimated the appellants/defendants that balance sale consideration amounting to Rs.500,000/- is ready for payment; therefore, per agreement she/appellant No.1 should effect transfer of the suit property in his favor before Pakistan Defence Officers Housing Authority, Karachi. Per record after receiving information of mutation of the case property in the names of appellants/defendants, the appellant No.1/defendant No.1 informed to respondent No.1/plaintiff No.1 that appellant No.4 and 5, who were minors at the time of execution of agreements have attained majority and residing in England, therefore, he (respondent/plaintiff No.1) should send transfer documents to them of their respective shares, accordingly on the advice of appellant No.1/defendant No.1, the respondent No.1/plaintiff No.1 sent such documents to appellant No.4 and 5/defendant No.4 and 5 through appellant No.1 for execution by them before the High Commissioner of Pakistan in London; the appellant No.4 and 5 then appeared before the High Commissioner of Pakistan in London and documents were executed by them and then submitted to DHA (Defendant No.6), who after scrutiny sought legible copy of order, passed by the learned Guardian Judge Lahore dated 04.05.1994 for the purpose of transferring the share of the minors/appellants in favor of respondent/plaintiff. However, at this stage when performance of contract in question was about to complete, the appellant No.1/defendant No.1 repudiated from contract by refusing to produce and provide legible copy of order of Guardian Judge, Lahore dated 04.05.1994 to DHA (defendant No.06) through her counsel's letter dated 17.08.1995. DHA replied the said letter of appellant's counsel and on 17.09.1995 also sent its copy to respondent No.1/plaintiff No.1, who through notice sent to appellant No.1/defendant No.1 requested her to receive balance payment of the contract, but appellant No.1/defendant No.1 refused to receive the legal notice of respondent No.1/plaintiff No.1. In such circumstances, claim of the appellants/defendants is not worth accepting that the respondents/plaintiffs did not fulfill their contractual obligations

by not making payment of balance amount of Rs.500,000/- within 7 days of mutation of their shares in their respective names in DHA record on 17.01.1995. Evidently, the appellants/defendants themselves failed to perform their contractual obligation as stipulated in the contract. Besides, the appellant/defendant No.2 and 3 inspite of submissions of their respective written statement did not come in witness-box in order to corroborate the contents of their written statement; therefore, without leading evidence on oath, the version of the appellants/defendant has no legal value in the eyes of law

25. With regard to payment of balance amount of Rs.500,000/- to the appellant/defendant by the respondents/appellants, the plea taken by the respondents/plaintiffs that after mutation of the property effected in the names of appellants/defendants by the concerned authority vide letter dated 17.01.1995 (Ex.P/15), the respondent No.1/defendant No.1 intimated such fact to the appellant No.1/defendant No.1 through telegram dated 22.01.1995 (Ex.P/20) offering balance amount ready for payment, but it was the appellant No.1/defendant No.1 who had failed to appear before the defendant No.6 (DHA) for execution of transfer documents. The respondent/plaintiff through leading their evidence have been able to prove that they were waiting to perform their part of the agreement, but they could not get it performed due to failure on the part of appellants/defendants, who avoided and were unwilling to perform their part of agreement. It is also noticed by this court that despite of willingness by respondent No.1/Plaintiff No.1 to pay balance amount to the appellant/defendant as they alleged repelledly in their case, but they could not justify it with any supporting or convincing reason that why they did not deposit the balance sale consideration of Rs.500,000/= during proceedings before trial Court or first appellate Court and even this Court. It was obligatory upon the respondents/plaintiffs to demonstrate in unequivocal terms in their pleadings, as well as by their conduct throughout the proceedings of the case that they have always been ready and willing to perform their agreed part of the contract. The Hon'ble Supreme Court, while deciding case of Muhammad Siddiq V/s. Muhammad Akram reported in (2000 SCMR 533) had decreed the suit for specific performance filed after a lapse of 9 years of agreement of sale, and increased the

balance sale consideration of Rs.2,000/= to Rs.100,000/= owing to depreciation in the value of currency.

26. The upshot of the above discussion could be that the appeal being devoid of merits is dismissed and concurrent findings of two courts below are uphold with the modification that amount of Rs.500,000/= being balance sale consideration of suit property alongwith additional consideration of Rs.800,0000/= (eighty lacs) in view of the devaluation and simultaneously substantial depreciation of currency and simultaneously substantial increase in the value of the property located within the area of Defence Housing Authority be deposited in the office of Nazir of this Court within four months' time from the date of this judgment as it would be expedient in the interest of justice, fair play and equity. The appellants/defendants are directed to effect the transfer of the suit property i.e. Commercial Plot No. 11-C, Sehar Lane-3, Phase-VII, measuring 200 Square Yards, Pakistan Defence Officers' Housing Authority, Karachi in favour of the respondents/plaintiffs after depositing the balance as well as additional consideration by them as ordered *supra* within stipulated time. In case of failure, to transfer the suit property in the names of respondents/plaintiffs by the appellants/defendants after depositing the balance and additional sale consideration in the office of Nazir of this Court, the Nazir is directed to effect the transfer of the suit property in favour of respondents/plaintiffs under intimation to this Court.

Order accordingly.