

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1680 of 2015 [Shahzad Nabi Vs. Naseer Turabi and 09 others]

Dates of hearing : 12.02.2019 and 27.02.2019.

Date of Decision : 18.10.2019

Plaintiff : Shahzad Nabi through Mr. Tariq Hussain, Advocate.

Defendants No.1 to 7 : Naseer Turabi and six others through Mr. Farhatullah, Advocate.

Intervener : Syed Anwar Saeed, through M/s. Akhter Hussain and Muhammad Masaud Ghani, Advocates.

Ms. Leela @ Kalpana Devi, AAG.

Case Law relied upon by Plaintiff's Counsel

1. 2015 SCMR page-828
[Adi Tiwana and others vs. Shaukat Ullah Khan Bangash]
2. 2011 CLC page-1787 [Peshawar High Court]
[Sardar Ali Shah and others vs. Ghufraan Ullah and others]
3. 2015 YLR page-1213 [Sindh]
[Muhammad Shoaib vs. Jamila Khatoon]

Case law relied upon by Defendants' Counsel

1. 2015 MLD page-49 [Sindh]
[Syed Muhammad Waqar Ud Din vs. Owais Ahmed Idrees]
2. PLD 1991 Supreme Court page-368
[Commissioner of Income Tax, Peshawar Zone, Peshawar vs. Messrs Siemen A.G.]
3. PLD 1947 Privy Council page-360
[Paul Couvreur and another vs. M.G. Shapiro]

4. 2017 SCMR page-1696
[Muhammad Abdur Rehman Qureshi vs. Sagheer Ahmad]
5. 2017 SCMR page-2022
[Hamood Mehmood vs. Mst. Shabana Ishaque and others]
6. PLD 2003 Supreme Court page-430
[Mst. AminaBibi vs. Mudassar Aziz]
7. 2003 SCMR page-953
[Haji Abdul Hameed Khan vs. Ghulam Rabbani]

Other precedent

1. 2004 CLD page-984.
[Messrs Ravians Paper and Board Industries Limited vs. Messrs Taj Company Limited]
2. 2017 Civil Law Cases Note 4 (Sindh).
[S.M. Shoaib Baghpati vs. Umar Gul Agha]

- Law under discussion:**
- (1) Specific Relief Act, 1877.*[SPR]*.
 - (2) The Qanoon-e-Shahadat Order, 1984.
[the Evidence Law].
 - (3) The Code of Civil Procedure, 1908
[CPC].
 - (4) Contract Act, 1872.

JUDGMENT

Muhammad Faisal Kamal Alam, J:- The matter was reserved for passing order on the Issues framed on 29.03.2016, which are reproduced for sake of reference herein below_

- “1. ***Whether the suit is maintainable?***
2. ***Whether the Plaintiff is entitled to the relief of Specific Performance in view of his financial position or otherwise?***
3. ***What would be the effect of deposition of Rs.10 Million in cash and property documents of a residential plot bearing No.115-R, 300 Square Yards, Block-2, PECHS, Karachi?”***

2. Since the entire suit is to be decided on the above legal Issues, therefore, only that record is to be considered, which is undisputed. Plaintiff and Defendants No.1 to 7 have entered in a sale and purchase transaction of a built-up property (Double Storey House) at plot No.C-19 measuring 600 Square Yards, Block-20, KDA Schemed No.16, situated at Federal “B” Area, Karachi, (***Subject Property***), for a total sale consideration of Rs.4,00,000,00/- (Rupees Forty Million only). Plaintiff was/is a purchaser/vendee, whereas, Defendants No.1 to 7 were/are sellers/vendors.

3. Initially, Agreement to Sell dated 24.10.2013 was executed between Plaintiff and Defendants No.1 to 7, who for the sake of reference and distinguish them from other Defendants, be called as ‘**Objectors**’. Since the transaction could not be completed within stipulated time of three months, therefore, a subsequent Agreement with the caption ‘First Supplementary Agreement to Sell’ dated 21.01.2014 was executed, which was followed by yet another ‘Second Supplementary Agreement to Sell’ dated 04.02.2014. All these three Agreements are appended with the plaint as Annexures “A” “G” and “H”, respectively. Out of total sale price of Rs.40 Million (Rupees Forty Million), an advance payment of Rs.4 Million (Rupees Four Million) was paid by Plaintiff to the above Objectors. One of the main reasons which led the Plaintiff to file the present *lis* as averred in the plaint is that one of the Objectors-Defendant No.3 left for Canada and was not present on 06.03.2014 for the purpose of affecting mutation in favour of Plaintiff and although the Plaintiff had the balance sale price ready with him but the transaction could not be completed due to default on the part of Objectors. Plaintiff has following Prayer Clause_

“The Plaintiff, respectfully prays as under:-

- a. *To direct the Defendants to perform their respective part of sell agreement dated 24.10.2013 and take their remaining amount of Rs.3,60,00,000/- (Rupees Three Crore and Sixty Lacs only) and in lieu of that hand over peaceful possession of Suit Property i.e. Plot of Land with constructed Double Storey House thereon bearing Plot / House No.C-19 measuring 600 Square Yards, Block-20, KDA Schemed No.16, situated at Federal "B" Area, Karachi to the Plaintiff and gets the registered.*
- b. *Conveyance Deed in favour of Plaintiff in case the Defendants failed the Nazir of this Hon'ble Court may be directed to get the Sale / Conveyance Deed in favour of the Plaintiff.*
- c. *Direct the Defendant No.8 (KDA) to mutate the Suit Property in favour of the Plaintiff.*
- d. *Restraint permanently the Defendants, through legal heirs from alienating, transferring, encumbering, or in any other manner from creating any third party interest in property i.e. Plot of Land with constructed Double Storey House thereon bearing Plot / House No.C-19 measuring 600 Square Yards, Block-20, KDA Scheme No.16, situated at Federal "B" Area, Karachi.*
- e. *That the Defendants may also be restrained from transferring or alienating the suit property till the final disposal of instant suit.*
- f. *That any other relief(s) this Hon'ble Court may deem fit and property under the circumstances."*

4. Upon issuance of summons and notices, the claim of Plaintiff has seriously been contested by Objectors, who besides filing Counter-Affidavit to the main Injunction Application also filed CMA No.15222 of 2015 under Sections 151 and 94(e) Read With Order XVII Rule 3 of CPC, praying for dismissal of suit, as at the relevant time when this Application was filed, Plaintiff did not deposit the balance sale consideration as ordered on 08.09.2015 when the matter was first listed before the Court and *ad-interim* injunction was granted in favour of Plaintiff, by restraining

Objectors from creating any third party interest in the subject property, so also handing over its peaceful possession.

5. Mr. Tariq Hussain, Advocate, has vehemently argued that present suit is maintainable because after depositing of the balance sale consideration in the shape of cash and property document, neither any default as alleged to have been committed by Plaintiff nor any violation of the Court orders; an amount of Rs.10 Million (Rupees Ten Million) was deposited with the Nazir of this Court, whereas, for the remaining amount a title document of a costly property in PECHS has been furnished and in this manner compliance of the Court order is done, which is further confirmed by a subsequent order of 04.03.2016. It is further argued that at all times, the Plaintiff was and is willing to perform his part of contractual obligations, but in fact it was the Objectors who have committed breach of contract, by not completing the sale transaction in question within time but also has created third party interest, though in an illegal manner.

6. Gist of the case law cited by learned counsel for Plaintiff is that non depositing of the balance sale consideration within time is not fatal and the suit cannot be dismissed merely on this ground and it is not mandatory to deposit the sale price only in cash but other alternate can be resorted to, such as deposit of Bonds issued by Government Authority having the equivalent face value, or a property as security.

On the other hand, Mr. Farhatullah, Advocate, representing the Defendants No.1 to 7 have controverted the arguments of Plaintiff and relied upon the case law in support of their arguments, crux of which is that now it is mandatory in a suit for specific performance to deposit the balance sale consideration, failing which, the suit will be dismissed; that with the passage of time a general principle that time is not usually the essence of a contract in sale contracts for immovable properties, has been revisited; even

Courts cannot extent a specified time period of a contract, which is agreed between two private parties, as it would amount to novation of contract by a Court, which is not permissible, particularly under the Islamic Jurisprudence.

7. Defendant No.8 {Karachi Metropolitan Corporation-KMC} in its Written Statement has verified the ownership of above Objectors in respect of the subject property, while stating that it is a leased property.

8. Arguments heard and record perused.

9. Considering the undisputed record of the case and the Issues reproduced hereinabove and submissions made by the learned counsel for the parties, one more Issue should be added, which is_

“4. *What should the decision be?*”

10. Findings on the issues are as follows:

ISSUE NO.1	:	In Negative.
ISSUE NO.2	:	In Negative.
ISSUE NO.3	:	Accordingly
ISSUE NO.4	:	Suit is conditionally decreed.

REASONS

ISSUE NO.3.

11. This Issue is to be decided first.

Undisputedly three Agreements to Sell were executed between Plaintiff and Defendants No.1 to 7-latter being the owners of the subject property. First Agreement is of 24.10.2013 (*Annexure ‘A’ to the Plaintiff*), wherein, Rs.40 Million (Rupees Forty Million) is mentioned as the total sale price and Rs.4 Million (Rupees Four Million) has been paid as part

payment, whereas, under Clause-2, the balance consideration of Rs.36 Million (Rupees Thirty Six Million) was to be paid within 90 (ninety) days at the time of execution of Sale Deed or General Power of Attorney, that is, balance sale consideration should have been paid (as per the terms of this Sale Agreement) by 22.01.2014. Clause-5 of this First Agreement to Sell makes the time as essence of this Contract. The second Agreement is captioned as First Supplementary Agreement to Sell, which is appended as Annexure “G” to the Plaint. It is of 21.01.2014, that is, a date before the time of making balance sale consideration was ending. By virtue of Clause-1 of this Second Agreement, the time for making the payment was extended upto 07.02.2014 and Clause-2 whereof stipulates that all other terms and conditions of the First Agreement shall remain intact and valid. In the intervening period, payment was admittedly not made within the time frame and thus a Second Supplementary Agreement to Sell ‘dated 04.02.2014’ was signed between the parties hereto (*Plaintiff and Defendants No.1 to 7*). In one of the recitals of this third Agreement, it is clearly stated that balance sale consideration was to be paid by “07.02.2014”, but, “due to some unavoidable circumstances, the Vendee has once again requested for materialization / finalization of sale for another period upto 06.03.2014”. A new Clause-1(a) was incorporated in this third Agreement, which stated that if present Plaintiff / Vendee failed to make payment upto 06.03.2014, the transaction will be treated as cancelled / null and void, and the amount paid so far will be forfeited and the present Objectors / Vendors would be at liberty to sell out the subject property to any third party. Clause-2 of this Agreement has further clarified that all other terms and conditions of the earlier Agreements shall remain intact and valid.

12. The above shows that parties to the Agreement-Plaintiff and Objectors have at all material times agreed that time should be considered

as essence of the contract. The Plaintiff's main stance is that due to non-availability of one of the Objectors, who left for Canada, the transaction could not be completed within the above mentioned deadline (although denied by Objectors in their Written Statement), and to further substantiate this fact, photocopies of the Pay Orders representing the balance sale consideration have been annexed with the plaint as Annexure "I" from pages-67 to 71 (of the Court file). Similarly, the Plaintiff himself has also produced his Bank Statement of Account wherefrom according to the Plaintiff, the payments were made. This Bank Statement is of the period from 19.10.2013 upto 19.12.2013.

13. The second set of material facts are stated in CMA No.6995 of 2016 preferred under Order I Rule 10 of CPC, by one M/s. S.M&A Associates, which is represented by Mr. Akhtar Hussain, Advocate, who has argued with the support of documents appended with this Application, that in the intervening period the subject property was purchased by his clients, the said Intervener, claiming to be a Partnership Concern. The learned counsel has referred to the Agreement of Sale dated 23.06.2015 between Objectors and the Intervener for a sale consideration of Rs.45 Million, Public Notices in different Newspapers and finally the permission / No Objection Certificate (NOC) dated 21.09.2015 issued by the concerned Government Department-Master Plan Department, for conversion of subject property into commercial.

14. The third set of facts are that the Objectors vide their Legal Notice dated 15.03.2014, appended with the Counter-Affidavit of said Objectors to the Injunction Application (of Plaintiff), cancelled the above sale transaction with the present Plaintiff on the ground of default and failure to make the payments within time.

15. To appreciate the main stance of Plaintiff that the balance sale consideration was available with him, as also observed in the first order of this Court passed on 08.09.2015, while granting *ad-interim* relief to

Plaintiff, the record of the present case is to be examined. In the said order of 08.09.2015 the contention of Plaintiff's counsel is mentioned that the balance sale consideration of Rs.36 Million is already arranged by Plaintiff through Pay Orders, which are appended with the plaint. These Pay Orders have been perused and they represent accumulated figure of Rs.19 Million (approximately) and not Rs.36 Million as claimed by Plaintiff. **Secondly**, the Statement of Account of Plaintiff (as mentioned above) shows the closing balance of Rs.3068101.28 (Rupees Thirty Lacs Sixty Eight Thousand One Hundred One and Twenty Eight Paise only) as of 19.12.2013, that means, in the Bank Account of Plaintiff the requisite balance sale consideration was not available at the relevant time and that was the reason for signing the subsequent two Supplementary Agreements; it is mentioned in those Agreements that the time period has been extended on the request of vendee, that is, present Plaintiff. **Thirdly**, on 06.11.2015, the learned Advocate for Objectors has moved an urgent Application and stated that Plaintiff has failed to deposit the entire balance sale consideration of Rs.36 Million within 15 (fifteen) days and requested the Court to dismiss the suit for non-compliance. On 17.11.2015 adjournment was sought on behalf of Plaintiff's counsel whereas the Legal Team of Objectors (Defendants No.1 to 7) reiterated their request for dismissal of suit, however, the same was declined and *ad-interim* orders were extended. On 04.12.2015, *inter alia*, son of Plaintiff was present but on a query could not give a definite date of depositing of balance sale consideration. On the next date (15.12.2015), the same situation persisted. On 23.12.2015, the Plaintiff's side requested for modification of order that instead of depositing balance sale consideration, he may be allowed to deposit solvent security as an alternative. This request was opposed by the Legal Team of Objectors.

16. The order of 12.01.2016 states that again Plaintiff repeated his request that he may be allowed to deposit the solvent bank guarantee equivalent to balance amount as Plaintiff has also spent considerable amount in getting the suit property commercialized. Since this was a new plea in the proceeding, therefore, it was observed in the same order that relevant documents relating to commercialization may be brought on record by Plaintiff and it will be scrutinized by this Court and if it is found that considerable amount towards commercialization was not paid but only initial process of commercialization was done then the Issue framed in the order of 23.12.2015 shall be decided on the basis of arguments. At this point, it is necessary to clarify that the Issues framed on 23.12.2015 were finally merged in the Issues framed on 29.03.2016 upon which the entire case is to be decided now. In pursuance of the directions mentioned in this last order, the learned counsel for Plaintiff had filed his Statement dated 18.01.2016 with a supporting affidavit in respect of commercialization of subject property. The documents appended with this Statement show that only process of commercialization was initiated and no considerable amount was / has been spent by the Plaintiff, as claimed, therefore, this claim of Plaintiff also stood belied by the documentary evidence of the Plaintiff himself.

17. Position remained the same on couple of dates and on 01.03.2013 an Application was preferred by Plaintiff that he may be allowed to deposit Rs.10 Million in the shape of Pay Orders and title documents of another residential Plot No.115-R, 300 Square Yards, Block-2, PECHS, Karachi (PECHS property), as part of surety / security, in order to show the *bona fide* of Plaintiff for completing the sale transaction in question. Nazir was directed to get the proposed property evaluated while observing that “if the Plaintiff fails to deposit Pay Order of Rs.10 Million within 02 (two) days from today, the Office is directed to fix this matter in Court for passing necessary orders,

keeping in view the recent Judgments of Hon'ble Supreme Court reported in 2015 SCMR Page-828, 2015 MLD Page-49 and 2012 SCMR Page-900, the gist of which, *inter alia*, is that failure to deposit a balance sale consideration in Court despite giving opportunities was fatal and the suit was ultimately dismissed.”

Admittedly, the above amount was not deposited within two days as directed in the last order and to overcome this, yet another Application under Section 151 CPC, was filed being CMA No.3525 of 2016 dated 03.03.2016, stating the justification, that due to some misunderstanding the last order could not be complied with and the Court may condone delay of one day in depositing the security as well as cash amount of Rs.10 Million (Rupees Ten Million). The request mentioned in the Application was accepted vide order dated 04.03.2016 and one week time was granted. The endorsement on the order sheet by the Nazir Office shows that the Pay Orders of Rs.10 Million (Rupees Ten Million only) were deposited with the Nazir.

18. The reported Judgment of Adil Tiwana Case (2015 SCMR page-828) is relied upon by the learned counsel for Plaintiff in support of his arguments, that it is not necessary that only pay orders or cross-cheques can be deposited towards balance sale consideration, but any solvent security can be deposited and the same should be considered as a compliance of Court directions; respondent / plaintiff (*of the reported case*) when filed the suit for specific performance, the Court directed him to deposit the Defence Saving Certificates having a face value of Rs.9 Million, which in fact was balance sale price of the transaction, but when the same could not be deposited then the respondent sought permission that he may be allowed to deposit WAPDA Bonds having the equal face value, which was eventually accepted and the WAPDA Bonds which were earning 19% annual interest, were deposited in Court, where after, during pendency of the litigation the

respondent-plaintiff replaced those WAPDA Bonds with Bank Guarantee which later expired but the same were not replaced by any other government securities or cash deposit. The cited case is distinguishable for the reasons that (i) the plaintiff (*of the reported case*) was allowed to deposit movable security which is readily encashable and covers the entire value of balance sale price, but here, out of Rs.36 Million (balance sale consideration) only Rs.10 Million was deposited in the shape of pay orders and for the rest ownership documents of the above referred PECHS property was furnished, which belongs to a near relative of the present Plaintiff. Even the property offered as an alternate does not **belong to or own by Plaintiff.** The object and purpose of giving directions to deposit balance sale price in the Court is to test the *bona fides*, readiness and willingness of Plaintiff, besides, tentatively assessing his financial ability. Readiness and willingness of a party to purchase a property is directly linked with his financial soundness. These terms 'ready' and 'willing' to complete sale, cannot be claimed by a party merely by stating so but in such type of litigation, this readiness and willingness should be demonstrated through tangible evidence even at the initial stage, *inter alia*, by depositing balance price in Court. In the present case had the Plaintiff deposited the balance sale consideration through readily encashable securities or other kind of movable property, then it would have reflected positively on his financial soundness which is directly linked with his claim of readiness and willingness to complete the sale transaction, **but here**, furnishing documents of an immovable property that too admittedly belongs to some other person cannot be accepted as compliance of the Court order. There is no guarantee that if Plaintiff would have succeeded in his claim, the owners of the PECHS property would also agree to dispose of the said property and from its sale proceeds the balance price of present transaction would be paid to Objectors. It is a long drawn out process and a concept foreign to sale

transactions, which are done now a days in this present volatile market conditions; *(ii) secondly*, in the above reported Judgment, Hon'ble Supreme Court has overturned the decision of the Court below, which has granted the decree of specific performance. The Apex Court has observed that when a specific date was mentioned for making payment for the balance amount which was not paid and the terms of the contract shows that the time was essence, then such a default on the part of Vendee disentitles him for a decree of Specific Performance. In the same context, Section 22 of the Specific Relief Act was also interpreted by holding that all equities are squarely in favour of the vendor / appellants.

19. The other two Judgments relied upon by the Plaintiff's Legal Team are also distinguishable because in the first Judgment of Sardar case, the learned Peshawar High Court has basically expounded the scope of Section 35 of the Specific Relief Act, relating to the recession of a contract if a purchaser fails to pay purchase money under the Court orders and in the second Judgment given in Shoaib case (*supra*) by this Court, the finding that non deposit of amount by Plaintiff is not fatal, was given in view of facts, that the stance of defendants (*of the reported case*) were self-contradictory, rather false.

20. It is also necessary to mention that the Objectors have filed two different Review Applications under Section 114 of CPC being CMAs No.1279 of 2016 and 4137 of 2016 against the orders dated 12.01.2016 and 04.03.2016, *inter alia*, for extending the time to comply the directions to deposit the balance sale consideration but only to the extent of Rs.10 Million (Rupees Ten Million). The other admitted inescapable aspect of the case is that the time mentioned in the last agreement—'Second Supplementary Agreement to Sell of 04.02.2014' is that balance sale price should be paid upto 06.03.2014, was till date not complied with in letter

and spirit, even after passage of more than three years; or at least, till the order dated 04.03.2016, regarding which the Objectors are seeking review [as already mentioned in the preceding paragraphs]. Such a glaring default and breach on the part of Plaintiff cannot be justified or overcome by merely submitting property document of a near relative. Thus, the answer to Issue No.3 is that depositing of Rs.10 Million through Pay Orders and title documents of PECHS property cannot be equated with the deposit of balance sale consideration as required in *lis* of the nature.

21. The above act on the part of Plaintiff is also adversely affected by another Judgment of Apex Court handed down in Hamood Mehmood case-2017 SCMR page-2022, wherein, it is held, that now it is mandatory in a suit for specific performance, that balance amount be deposited in Court, otherwise it would result in dismissal of the suit. The overall conduct of present Plaintiff as discussed hereinabove does fall within the ‘contumacious / omission’ as mentioned in the above reported case, entailing an adverse consequence for Plaintiff. Hence, Issue No.3 is answered accordingly.

ISSUES NO.1 AND 2.

22. The second set of facts stated in the foregoing paragraphs is about sale of the subject property to the above named third party (M/s. S.M.&A Associates) through the Agreement of Sale dated 23.06.2015, which is Annexure ‘I/2’ (at page-443 of the Court file) to the CMA No.6995 of 2015 preferred by the said Intervener; the other documents on which Mr. Akhtar Hussain, Advocate, has relied upon is Annexure ‘I/3’ relating to process of commercialization of the subject property, which has been initiated by the said Intervener. The present suit has been filed on 08.09.2015, that is, almost after 10 weeks from the execution of subsequent Sale Agreement with the Intervener. Despite conditional restraining order which was granted on 08.09.2015, the balance sale consideration admittedly could not

be deposited, until 04.03.2016, in the manner already stated above. Considering the undisputed record of the case, the arguments of learned Advocate for the Intervener has substance that the latter (M/s. S.M.&A Associates) is a *bona fide* purchaser of the property for valuable consideration. Hence, relief of Specific Performance in the present suit cannot be granted to Plaintiff, *inter alia*, in view of the Rule laid down in the reported decisions relied upon by the legal team of Objectors and particularly of Hon'ble Supreme Court in 2017 SCMR page-1969. In this reported decision of **Saghir Ahmed Case**, the Hon'ble Supreme Court has expounded, or, revisited the principle 'usually contracts involving immovable properties, time are generally not of the essence'. Taking into the account the present market trend and other commercial factors, the Apex Court is of the view that a seller cannot be left at the mercy of the buyer. It would be advantageous to reproduce the relevant portion of the Judgment herein under_

“9. As far as the argument of learned counsel for the appellant that time was of the essence of the contract is concerned, we do not find ourselves in agreement with him for the reason that admittedly time for execution of the sale deed was extended on a number of occasions and at least on a few of the said occasions it was on the request of the appellant. However, in view of the commercial nature of the property business and a widespread trend of rapid increase in prices of immovable properties, a seller cannot be left at the mercy of the buyer to bind him in an agreement to sell and then delay completion of the contract for as long as he may wish hiding behind an archaic legal principle that in contracts involving immovable properties, time is generally not of the essence. This rule was settled many centuries ago when prices of real estate remained constant and stagnant for years on end. It is high time that this rule was revisited and revised keeping in view the changed circumstances and the ground realities of the real estate market. In this day

and age, on account of rapid increase in population demand for real estate has increased. Further, on account of various reasons better financial resources are available with prospective purchasers. Being investors have also entered the fray to take the benefit of growing demand for real estate. On account of increasing demand and limited supply, property prices rise rapidly, at times in a matter of months. Therefore, the aforesaid principle that in real estate transactions, time is not of the essence cannot indiscriminately be applied. It must interpreted and applied specifically considering the facts and circumstances of each case to balance equities, keeping the standards of reasonability in mind and ensuring that injustice is not done to either side.”

23. The Plaintiff never had the funds to purchase the subject property, which is now proved from the undisputed documents appended with the plaint and in view of the discussion mentioned in the foregoing paragraphs. Both Issues are answered in Negative and against the Plaintiff.

ISSUE NO.4.

24. Even though in the last Agreement between Plaintiff and Objectors, viz. ‘Second Supplementary Agreement’ it is mentioned in Clause 1-(a) that failure to make the payment by 04.03.2014 the amount of Rs.4 Million paid as advance money / part payment will be forfeited, but at the same time the other admitted fact is that within a year the subject property was sold to the above named Intervener for a higher price, that is, Rs.45 Million. Therefore, as such the Objectors have not suffered monetary losses and in my considered view above referred penalty Clause 1(a) in the given circumstances, should not be invoked strictly. On the forfeiture of amount the above mentioned two Judgments, viz. **2004 CLD 984-Messrs Ravians Paper case** and **2017 CLC note-4 (Sindh)-Bagh Pati case**, are relevant. In both Judgments handed down by learned Division Benches of

learned Lahore and our High Courts have laid down that advance or earnest money can be forfeited if a purchaser backtracks from his contractual commitments. Particularly, *Ravians Paper case* contains an exhaustive discussion on Sections 73 and 74 of the Contract Act and forfeiture of amount. It is a settled legal principle that parties may determine expected losses and agree for an amount to be paid in breach of contract. While relying upon a reported decision of Privy Council, it is held (in Ravians paper case), that, ‘earnest money is part of the purchase price when the transaction goes forward. It is forfeited when the transaction falls through by reason of fault and failure of the Vendee’ (*Underlined for emphasis*). But at the same time there is also a judicial consensus, so also held in the reported case above, that the discretion is with the Court to interpret and implement a forfeiture clause contained in an agreement

If it appears to the Court that amount mentioned in the agreement as liquidated damages, penalty, or, a forfeiture, as the case may be, is unreasonable or unconscionable, then it is not necessary to implement such clause in a strict sense. Court will not permit a party to keep the entire amount if it is exorbitantly high and unreasonably harsh. In the present case, the Objectors have not made any counter claim for award of damages, which otherwise cannot be granted, unless a positive evidence is produced by a party claiming damages.

Present undisputed record shows that Objectors / Vendors have not suffered losses which can justify forfeiting the amount of rupees four million paid as advance money to them by Plaintiff. Object of such clause is to reasonably and **equitably** compensate an aggrieved person and such kind of forfeiture clauses cannot be implemented in such a manner that it can result in a windfall profit for an aggrieved party.

25. The upshot of the above is that the present *lis* justifies invoking Section 22 of the Specific Relief Act, by holding that even though Plaintiff is not entitled for the specific performance of Contract or any other relief claimed, but is only entitled to get back rupees three million of the advance payment paid to the Objectors/Vendors. Objectors should return the above amount of Rupees Three Million (Rupees Three Million) within four weeks from today to Plaintiff, while forfeiting rupees one million. Similarly, the Nazir will also release the PECHS property document kept as security to Plaintiff together with Rupees Ten Million along with accruals, if any, in accordance with Rules.

26. The suit is decreed in the above terms. Parties to bear their own costs.

JUDGE

Karachi
Dated 18.10.2019
M. Javid/PA